TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 10

SIMON BOUIE AND TALMADGE J. NEAL,
PETITIONERS,

vs.

CITY OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITION FOR CERTIORARI FILED JUNE 5, 1963
CERTIORARI GRANTED JUNE 10, 1963

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[fol. 1]

Statement

Appellants Simon Bouie and Talmadge J. Neal are Negroes who, at the time of their arrests, were college students attending private colleges in the City of Columbia, South Carolina, their home city. They were arrested on March 14, 1960 and charged with the offenses of Trespass and Breach of the Peace, and as to Simon Bouie alone Resisting Arrest. Appellants were tried before Honorable John I. Rice, Recorder for the City of Columbia, without a jury, on March 25, 1960. At the conclusion of all the evidence, the Recorder found both appellants "Guilty" on the charge of Trespass and found Simon Bouie "Guilty" of Resisting Arrest. Appellant Bouie was sentenced to pay a fine of One Hundred ($100.00) Dollars or serve thirty (30) days in jail on each charge, provided that Twenty-four and 50/100 ($24.50) Dollars of each fine was suspended, the sentences to run consecutively. Appellant Neal was sentenced to pay a fine of One Hundred ($100.00) Dollars or serve a sentence of thirty (30) days in jail, provided that Twenty-four and 50/100 ($24.50) Dollars was suspended.

Notice of Intention to Appeal was timely served upon the Recorder as required by law, each of the appellants having on deposit cash bonds which were allowed to serve as appeal bonds. Subsequently, appeal bonds with good and sufficient sureties were filed in lieu of the cash deposits.

Thereafter, by consent this case was consolidated with a similar appeal from the Columbia Recorder's Court and argued before Honorable John W. Crews, Judge of the Richland County Court (Criminal Division). By Order dated April 28, 1961, Judge Crews affirmed the judgment of the Recorder's Court.

Notice of Intention to Appeal was timely served upon the City Attorney.

[fol. 2]

IN THE
RECORDER'S COURT OF THE CITY OF COLUMBIA
STATE OF SOUTH CAROLINA

THE CITY OF COLUMBIA, Plaintiff,

vs.

SIMON BOUIE and TALMADGE J. NEAL.

Transcript of Record—March 25, 1960

Mr. Jenkins: Your Honor, this is my associate Matthew J. Perry, of Spartanburg. He will be taking part in the case. We will plead the defendants "Not Guilty".

The Court: Jenkins, at the outset, I might state that I want everybody to be heard. I want to give everybody a chance to be heard but I do not want any long, repetitious testimony. I want everybody to be heard but I don't want to prolong this for an indefinite period *ad infinitum*.

Mr. Jenkins: Your Honor, we are well aware of the fact that you are going to conduct this case in an impartial manner and give everybody his day in Court. However we should also like to say at the outset, while we do not intend to unduly delay the Court, we must try the case in order to take advantage of all the rights of our clients. We cannot set any limit on time. It appears to me that the time will be determined by the development of the case.

The Court: I'm not going to set a limit at this particular time but if I see that an undue length of time is being taken by anybody, I intend to put a stop to it.

Mr. Jenkins: I understand that, your Honor, but we have a right to take exceptions.

Mr. Shep A. Griffith, being duly sworn, testifies as follows:

Direct examination.

By Mr. Sholenberger:

Q. Mr. Griffith, I believe you are Assistant Chief of Police for the City of Columbia?

A. I am.

[fol. 3] Q. How long have you been with the Police Department?

A. For 25 years.

Q. All right, sir, Mr. Griffith, as a result of information that you have, did you with another police officer in Columbia, go to Eckerd's drug store on the 14th day of March, 1960?

A. I did.

Q. About what time?

A. I have forgotten.

Q. Around the noon hour?

A. Somewhere around noon or shortly after.

Q. When you arrived there did you see the defendant Simon Bouie and the defendant Talmadge J. Neal?

A. I did.

Q. Suppose you relate to the Court what the circumstances were in regard to the two defendants and just what you observed in regard to them?

A. Well, Detective Slatterer and I went there as a call to Headquarters that there was some disturbance in Eckerd's Drug Store. When we arrived, Mr. Malone, who is the Manager, went back to the booth. He met us about halfway up the store and he went back to a booth with the two defendants Neal and the other boy, Bouie, and he said: "Now, you have served your purpose and I want you out, because we aren't going to serve you" and they sat there just ignoring him, so to speak, kept reading or looking down at something, whether they were reading or not, and he said: "I'm asking you the second time to get on out." That was in my presence, so then I told them both that the Manager wanted them out and they should go on

out, and this boy on the other side there, Bouie, said: "For [fol. 4] what?" I said: "Because it's a breach of the peace and I'm telling you the second time to go on out." He said: "Well, I asked you for what?" So at that time I reached and got him by the arm. Neal here had started to make an effort to get up but the other boy had not, and I had to pull him up out of the seat, so I stood them up and made a preliminary frisk, which we usually do to see if they had any weapons on them and I found none. Then I caught him in the belt, his belt and his breeches.

Q. You were in back of him at that time?

A. I was in back of him. Pretty much my whole body was covering him, because he had been told that he was under arrest if he didn't move, but he told me, he said: "Don't hold me, I'm not going anywhere" and I said: "Boy, that's my privilege, go ahead" so we had gone out a few steps, three, four or five yards, he started pushing back, and he said: "Take your hands off me, you don't have to hold me" and a lady started screaming: "Get him out, get him out" and I kind of tiptoed him and got him out in that position.

Q. Then you brought him down here?

A. Yes, sir.

Q. This occurred while they were sitting in a booth?

A. Yes, sir.

Q. Was that close by the food counter at Eckerd's?

A. Well, it is a food counter.

Q. Do you know anything else about this case?

A. Well, on the way down here he seemed to be very excited. He kind of did like that, clapping his hands.

Q. Which one did that?

A. Bouie. He said: "I wonder how many they're going to arrest tomorrow", and when we charged him in here for [fol. 5] resisting arrest, he said: "Well, the reason I was resisting was the way you were taking me out."

Q. Mr. Griffith, during the search down here, did you get any information from either one of the defendants?

A. I imagine you had better ask the guard because he sent me a copy of something that came out of Neal's package.

Q. Is this a copy of what you were sent?

A. Yes, sir. We made a copy and put it back in his package.

Q. Anything else you have to say?

A. That's about all.

Mr. Sholenberger: I want to have this marked for identification at this time.

(Copy of Students' Movements, marked for Identification, Exhibit No. 1.)

Cross examination.

By Mr. Jenkins:

Q. Chief Griffith, this occurrence which led to the charges made here, took place on the 14th day of March, 1960?

A. That's right.

Q. I believe you testified that you went to Eckerd's Drug Store on Main Street in the City of Columbia in response to a call to headquarters?

A. That's right.

Q. Do you know who made the call to headquarters?

A. I do not.

Q. Did you know at the time that you went to Eckerd's, what circumstance you were going to investigate?

A. I did not.

[fol. 6] Q. When you arrived at Eckerd's I believe you said you were met by Mr. Malone, the manager?

A. Well, I don't say I was met. I say I met him in the middle of the store.

Q. Did you inquire of him whether he had placed the call to headquarters?

A. No, I didn't.

Q. Did you inquire of him as to why the Police Department had been called in?

A. No, I didn't.

Q. Did he advise you as to why you had been called in?

A. He said there were two colored boys back there in the seat and refused to move, yes, sir.

Q. That was the only reason he gave for calling you?

A. Yes, that's the only reason he gave.

Q. Now you saw these two defendants in Eckerd's?

A. Right.

Q. Now they were seated in a booth in the part of Eckerd's reserved for serving food?

A. That's right.

Q. What were they doing when you first observed them, Chief?

A. They apparently weren't trying to get any food because they were reading. They apparently weren't even attempting to get any food.

Q. When you saw them, Chief, when you first observed them, what were they doing?

A. I said they were reading. They were not attempting to get any food. You asked me the question as to whether they were sitting there where they served food, and I said they apparently were not attempting to get food, that they were reading. That's my answer.

[fol. 7] Q. The specific answer that you gave to my question is that they were sitting there reading? Is that correct?

A. Yes, but you asked me if they were sitting there at a booth where food was served, just prior to that, the immediate question before that.

Q. I think that's right. Now, I ask you if they were sitting in that booth in a section reserved for serving food, and your answer was "yes"?

A. I said "yes".

Q. I further asked you what were they doing when you first observed them?

A. I said they were not attempting to order food but were reading.

Mr. Jenkins: We submit, if your Honor please, that the Chief's answer is not in response to the question I asked him.

Mr. Sholenberger: If your Honor please, I think he's answered it to the best of his ability.

The Court: I think he's answered it very adequately. That's my opinion, that he's answered it.

Q. What in your opinion, Chief, is necessary for a person to do, to give the impression of ordering food, when they are in a restaurant or other place where food is served?

A. What should they do, or what is my impression?

The Court: Frankly, that's not admissible, what his impression is. We want him to testify about the facts of the case and not his impressions.

Mr. Jenkins: If your Honor please, the witness stated on several occasions his opinion in response to a question as to his observation.

A. I didn't say my opinion. If you will read back, I said they had not ordered food.

[fol. 8] Q. Upon what do you base your knowledge that they had not ordered food, Chief?

A. I said that they had not ordered food in my presence, or had not attempted in my presence.

Q. Although that had not been asked for, you volunteer that information?

A. You said this,—

Q. I know what I said.

A. You said were they in a booth where food was being served.

Mr. Sholenberger: Your Honor, counsel is attempting to get into an argument with the witness.

The Court: We're not going to have an argument.

Mr. Jenkins: If your Honor please, is counsel for the State asking that I be instructed not to get into an argument, or that the witness be instructed not to get into an argument with me? I am not arguing with him.

Mr. Sholenberger: His questions provoke an argument. Let him ask the questions straight and he'll get straight answers.

The Court: Jenkins, don't ask argumentative questions. Ask direct questions and if they are admissible, then he can testify to them.

Mr. Jenkins: I submit your Honor, that this witness is under cross examination and the Court has the right to rule on the admissibility of any questions I ask him. I will defer of course, to the Court's ruling.

The Court: Ask the question and I'll rule on whether it's admissible.

Mr. Jenkins: I reserve my right to ask questions on cross examination.

[fol. 9] Q. Back to your testimony, Chief, these two defendants were sitting in a booth?

A. That is correct.

Q. Now you observed them reading, apparently?

A. That's correct.

Q. Did you observe them doing anything other than reading?

A. No.

Q. Were they involved in any riotous or disorderly conduct when you observed them?

A. I didn't get the question?

Q. When you observed these two defendants, was either of them engaged in any riotous or disorderly conduct?

A. Well certainly there was no riotous. If it was disorderly conduct, it was because of the fact that the Manager had asked them to move, in my presence, and they refused to move.

Q. Other than that there was nothing which you would say was any disorderly conduct?

A. No.

Q. Now you did not charge them with disorderly conduct did you?

A. Well, breach of the peace, is what I charged them with.

Q. So the inference is that they were not guilty of any disorderly conduct. Is that right?

A. I didn't say that.

Mr. Sholenberger: Now if your Honor please, the witness can't be asked questions of a legal nature.

The Court: You can't put words in the witness' mouth.

Mr. Jenkins: If your Honor please, the section of the Statute under which these defendants are charged, is I [fol. 10] believe Section 15-909, which is entitled "Disorderly Conduct", etc. Now if the Court will indulge me, I will read a portion of that Statute.

The Court: Go ahead.

Mr. Jenkins: "The Mayor or intendent and any Alderman, Councilmen or Warden of any city or town in this State, may in person arrest or may authorize and require any Marshal or Constable, especially appointed for that purpose, to arrest any person who, within the corporate

limits of such a city or town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness or any other conduct grossly indecent or dangerous to the citizens of such a city or town, or any of them." In view of the fact, if your Honor please, that these defendants are charged under a Statute which sets forth all of these offenses, I am merely trying to elicit from this witness whether these defendants were guilty of any of these other offenses which are incorporated in this Statute.

Mr. Sholenberger: He has answered those questions. He said it was not riotous.

The Court: Jenkins, I take the position that the witness has answered the question adequately. He stated to you all he knows about the case and he stated the facts in the case.

Mr. Jenkins: If your Honor please, I submit I have the right on cross examination to ask the witness specifically whether these defendants were guilty of any of these other offenses. Of course again I submit that I will defer to the ruling of the Court, but I want the record to show that I am asking permission to direct such questions to this witness.

[fol. 11] Mr. Sholenberger: Your Honor, he has a perfect right to ask questions as to the facts, as to what they were doing, but as to an interpretation of what they did and what it constituted, that is an improper question in my opinion. That's for the Court to determine.

The Court: And I so rule on that.

Mr. Jenkins: May I hear specifically what your ruling is?

The Court: All right, my ruling is this; the witness has answered the questions insofar as the facts are concerned. The witness cannot pass upon the interpretation of the law but this witness has answered the questions fully and accurately as to the facts in the case.

Q. Now Chief, you testified that in your presence, Mr. Malone, the manager of the store, requested these two defendants to move. Is that correct?

A. That's correct.

Q. Did they answer him in any manner?

A. No.

Q. They did not?

A. No.

Q. What did they do?

A. They sat there.

Q. They continued whatever action they had done previous to the request to leave. Is that right?

A. They sat there. He asked them the second time and they still sat there.

Q. Now what, if anything, did you do after the manager had requested these two defendants to move?

A. I told them that the manager had requested them to move, in my presence. He had told them that they had served their purpose and he was not going to serve them, [fol. 12] and "Now I am asking you to move." The boy on my right there said: "For what?"

Q. Before we go that far, Chief, why did you ask them to move?

A. Because the manager, in my presence, had asked them to move, and it is my opinion that if he didn't want them in the store and he needed help, that it is my place to get them out. The store had come to a complete standstill so far as activities were concerned—

Q. Let me interrupt you just a minute, Chief. Up to this point, how long had you been in the store?

A. Oh, a matter of a very few minutes, two, three or four minutes.

Q. And yet, on the basis of the fact that you had been in there two, three or four minutes, do you think you are in a position to say that all of the activities of the store had come to a complete standstill?

A. That's right, there was a group of people standing there completely idle, watching. I don't know how long it had been going on. Even when I went in, everybody was standing watching.

Q. However, insofar as you know, they could have just been standing there watching anybody, whether these defendants were there or not?

A. They could have been, but I don't believe that was the case.

Q. We are not asking what you believe, Chief.

A. Well, I'm telling you, though, what I believe.

Q. Did the manager state any reason why he was asking these two defendants to leave?

A. He stated that: "You have served your purpose and you have been in here long enough to serve your purpose, we are not going to serve you and I'm asking you to get out."

[fol. 13] Q. Did he state any reason why he was not serving them?

A. No.

Q. In the part of the store where these defendants were sitting, in that general area, there are other booths and a food counter with seats?

A. That is correct.

Q. At the time you went in and observed these defendants sitting in the booth, did you observe any other persons sitting in that area where food is served?

A. No, I didn't.

Q. You say that the only persons seated in that area were these two defendants?

A. That's all I observed.

Q. Did you pay any particular attention as to whether there was anyone else there?

A. I certainly did because you couldn't help see, it was right immediately in front of you.

Q. When you went in, you did advise these defendants that they were under arrest when they did not move?

A. Yes, sir.

Q. Now when you went in and asked them to leave, were you attempting to assist the manager in getting them to leave?

A. No.

Q. What was your purpose?

A. My purpose was that they were creating a disturbance there in the store, a breach of the peace in my presence, and that was my purpose.

Q. Chief, I believe it may be helpful if you will describe to us what the disturbance was that was being created, and what the breach of the peace was that was being created?

[fol. 14] Mr. Sholenberger: He's gone over that three times exactly as to what happened.

The Court: He certainly has. Jenkins; I'll have to rule that out. The witness testified a half dozen times as to exactly what happened, time and time again, and I don't see where any elaboration is necessary.

Q. You testified I believe, Chief, that you asked these defendants to leave, only after the manager had asked them to leave?

A. That's correct.

Q. So, had the manager not requested them to leave, you would not have asked them to leave. Is that correct?

A. I would not, if the manager had not asked them to leave. That's correct.

Q. So then, you were, in fact, assisting the manager in evicting them, when you asked them to leave, and placed them under arrest. Isn't that true?

A. No.

Mr. Sholenberger: Now, Judge, he's asking for a conclusion.

The Court: Yes, it's all conclusions. In other words, Lincoln, I'll have to ask you to confine your questions to direct matters of fact and not on conclusions.

Q. Now, let's get a little further along with the facts then. These two defendants, after you asked them to move, continued to sit where they were sitting. Is that correct?

A, Yes.

The Court: He's testified a half dozen times already, as to that fact. I don't know why in the world you want to bring it out any more.

[fol. 15] Q. One of the defendants, Neal, I believe, immediately began to get up his things?

A. No.

Q. Tell us again what happened?

A. When I asked him the second time, or at least told him the second time, and I reiterated: "I'm telling you the second time to get up and come on out of here, because you are under arrest", this boy sitting on my left, he did make a move in the seat, apparently closing his book and started to get up but the other boy never did make any move at all to get up.

Q. Now, Chief, the defendant here in the dark suit is Bowie and the one in the brown suit is Neal. Will you please let the record show which of these defendants you're talking about when you say one closed his books or attempted to close his books?

A. Neal closed his book, after I asked him the second time, he made a move as though he was getting up.

Q. And he, in fact, did get up?

A. He didn't get up at first.

Q. Now Bouie, the second defendant, asked you the question, I believe, after you told him the second time to get up?

A. No, he asked me the first time, why.

Q. Why you asked him to move?

A. That's right, and I told him.

Q. Then I believe you said he asked you the second time, also?

A. No, he didn't ask me the second time.

Q. Tell us again what happened. I'm not really too clear, Chief, as to what you said?

A. I said: "I'm asking you the second time" and he still didn't make any move and I caught him by the sleeve of the coat and lifted him up out of the seat.

[fol. 16] Q. Now how much time elapsed between the time you asked him the second time and the time you caught him by his coat and lifted him out of the seat?

A. Enough for him to get up.

Q. A half minute or two minutes?

A. Enough for him to get up.

Q. Will you give us some idea as to how much time elapsed?

A. No, but he had had time to get up.

Mr. Jenkins: If your Honor please, I would like for you to note that the witness states emphatically that he refuses to answer the question.

The Court: The question has been answered adequately.

Q. Isn't it a fact, Chief, that you did not give him any opportunity to get up?

A. It is not a fact.

Q. This defendant Bouie also had a book with him?

A. Yes.

Q. Was this book open in front of him when you came in?

A. Yes.

Q. Was the book still open in front of him when you directed him the second time, to leave the establishment?

A. Yes.

Q. When you snatched him by the arm and snatched him out of the seat—

A. I didn't say I snatched. You said that.

Q. What did you say, sir?

A. I said I caught him by the arm and lifted him out of the seat.

[fol. 17] Q. When you caught him by the arm and lifted him out of the seat, do you know where the book was then?

A. Still on the table.

Q. Was this defendant making any effort to get that book?

A. No, not until I got him up.

Q. After you got him up did he make any effort to get the book?

A. Yes, sir.

Q. Did you allow him to get the book?

A. Yes.

Q. Now at what point did you catch him by his belt or by the back of his trousers?

A. I pulled him off to the side and gave him a preliminary frisk and then I caught him by the pants and the belt.

Q. What was your reason for catching him by the pants and the belt?

A. Because he was under arrest.

Q. Was the defendant Neal also under arrest?

A. Certainly he was under arrest.

Q. At that same time that you caught Bouie, Neal also was under arrest?

A. Yes, sir.

Q. Did you catch Neal by his belt and pants?

A. No, because he voluntarily got up without having to be lifted out of the seat.

Q. So then your reason for catching Bouie by the back of his pants—

A. Because he had shown some resistance to begin with.

Q. Had he shown any physical resistance, Chief?

A. Except I had to pick him up out of the seat.

[fol. 18] Q. Did he pull back or snatch away or anything of that sort?

A. Not right at that particular time but he did push back later on going out, when he said: "Take your hands off me."

Q. When you caught him by the back of the trousers, were you under the impression that he was going to attempt to run or escape?

A. We are under that impression with all of them, Jenkins. When they are put under arrest, all these men are instructed to put their hands on them and keep them under their control.

Q. If that is true, Chief—

A. Wait a minute. If there is any inclination whatsoever that there is any resistance.

Q. Isn't it a fact, Chief, that there was no other place for him to go except with you?

A. I don't know what his opinion was but my opinion was, that was true.

Q. So then it was absolutely unnecessary to catch him by his belt and by his trousers and lift him out?

A. I think it was necessary when he showed resistance, after having been asked four times, twice by the manager and twice by myself, and then refused, and I had to lift him out of the seat by his coat sleeve. I think there was resistance to begin with.

Q. Chief, did you personally have any objection to these defendants sitting where they were seated?

A. Personally, no.

Q. So it didn't make any difference to you where they sat?

A. No, sir, not from a police standpoint.

Q. What about personally, Chief?

A. I don't care for that.

[fol. 19] The Court: Hold on a minute. He hasn't got to answer that, Jenkins. His personal opinions and his beliefs and all that kind of stuff, are not admissible. No, he hasn't got to answer that.

Mr. Jenkins: Your Honor, we submit we have a right to question this witness as to his personal bias and prejudice.

A. I don't care to answer that.

The Court: Mr. Sholenberger, do you want to make any comment on that?

Mr. Sholenberger: I don't think he has to answer that. Anything in regard to this arrest and what was done, he can cross examine him but I don't think the personal opinion of anyone has anything to do with it.

The Court: It is not admissible and not germane to the issue. It hasn't got a thing to do with the case, his personal opinion, and I'm going to rule it out.

Q. Chief, are you aware of the race and color of these two defendants?

A. Why certainly I am.

Q. In your opinion, what is the race and color of them?

A. Negro.

Q. Now, Chief, I just want to ask you a couple questions about the general layout at Eckerd's drug store. It's a relatively large store. Is that correct, as compared with drug stores in the City of Columbia?

A. I would say so, I guess.

Q. It is generally considered to be one of the most popular drug stores in the City of Columbia. Is that right?

A. It is a popular drug store.

Q. There are a number of departments in that store. Is that correct?

[fol. 20] A. That's correct.

Q. Drug department, cosmetic department, toilet articles, etc.?

A. That's correct.

Q. And in addition there is a food department?

A. That's correct.

Q. Where food is sold and is served?

A. That is correct.

Q. And where the public is invited in to purchase food and eat food. Is that correct?

A. Well, I don't know what you mean by public. Explain what you mean by the public being invited? It's a public place, if that's what you mean.

Q. It's a public place of business?

A. That's correct.

Q. It is patronized generally by the public of the City of Columbia?

A. That's correct.

Q. White and Negro?

A. I would assume so, yes, sir.

Q. That's reasonable, isn't it?

A. Yes.

Q. Do you know whether or not Negroes generally are served in the ordinary departments of Eckerd's drug store?

A. I certainly would say so, yes.

Q. Do you know whether or not Negroes are served in the food serving department at Eckerd's drug store?

A. Not that I know of.

Q. Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons, was because they were Negroes who were asking for service in the food department in Eckerd's drug store, [fol. 21] and the manager was directing them out because they were Negroes? Isn't that correct?

A. Why certainly, I would think that would be the case.

Officer I. F. GARDNER, being duly sworn, testifies as follows:

Direct examination.

By Mr. Sholenberger:

Q. Mr. Gardner, I hand you here a paper marked for Identification as Exhibit No. 1. Is that a copy of a paper taken off the person of the defendant Neal?

A. That's right.

Q. Did you take it off of him when you searched him?

A. Yes, sir.

Mr. Sholenberger: I would like to offer this paper in evidence.

(Exhibit No. 1 offered and received in evidence.)

Mr. Jenkins: If your Honor please, we object to the introduction of this paper, on the ground that it is irrelevant and immaterial insofar as the charges against the defendants are concerned.

The Court: Mr. Sholenberger, counsel has objected to the introduction of that, and I would like to hear what you have to say about it.

Mr. Sholenberger: If your Honor please, this is introduced for the purpose of showing—

Mr. Jenkins: If I may interrupt. Have you ruled on it?

The Court: No, I haven't. I want to hear from both sides before I rule on it.

[fol. 22] Mr. Sholenberger: This is introduced for the purpose of showing that there was a concerted effort and action on the part of a group, including these two defendants, to go on the premises for the purpose, a predetermined purpose, of creating the situation that has just been created before your Honor by the testimony. That is the purpose of showing the intent and the purpose behind the movement.

The Court: Counsel for the defendants, if you have any comments, I would like to hear you.

Mr. Jenkins: Your Honor, these defendants are charged with trespass and a breach of the peace, concerning alleged incidents which took place at Eckerd's drug store on Main Street. As I view this paper, which is attempted to be introduced into evidence, Eckerd's drug store does not appear there any place. Further, this paper is not signed, it contains no signature, and the conclusion reached by the State that it shows a concerted effort on the part of these defendants to violate the law at the time they went into Eckerd's drug store, which gave rise to the charges against them, has nothing whatsoever to do with this instrument. I repeat that the paper here is irrelevant to the issues involved here. Further if your Honor please, assuming that the position taken by the State is to be true, that there was a concerted effort on the part of these defendants to go on the premises of Eckerd's or any other business establishment and do what they did when they went into Eckerd's, even if they did it for the specific purpose of bringing about a lawsuit, the Courts have ruled that they had a perfect right

to do so, if in fact the right exists for them to go into the place where they went, and we respectfully submit that they had a legal right to go where they went and to do what they [fol. 23] did. For those reasons, it is our position that this paper should not be introduced in evidence and we object to its introduction.

The Court: I'll admit it subject to objection.

(No cross examination.)

Chief Shep Griffith recalled, testifies further as follows:

By Mr. Sholenberger:

Q. All this occurred in the City of Columbia, County of Richland, and the State of South Carolina?

A. Yes, sir.

Mr. Perry: All of which is admitted.

The State Rests

(The State rests.)

Colloquy Between Court and Counsel

Mr. Jenkins: If your Honor please, we ask that the manager of Eckerd's, Mr. Malone, be subpoenaed. We take the position that he, if he is in Court, would be a hostile witness. However, we take the further position that his testimony is germane to the issues involved here, that in view of the fact that his testimony in all probability would be hostile to us, we respectfully request permission of the Court to question this witness as a hostile witness.

The Court: Mr. Sholenberger, do you have any comment?

Mr. Sholenberger: They can subpoena him if they wish.

The Clerk: Your Honor, he was notified to be here and Dr. John Terry (?) was notified to be here.

Mr. Sholenberger: I don't know whether they were subpoenaed. They don't have to testify unless they were subpoenaed.

[fol. 24] The Court: Dr. Malone is in Court and he can testify if he wants to.

Mr. Jenkins: I want the record to show that as counsel for the defendants, I took all the steps necessary to have this witness subpoenaed.

Mr. Sholenberger: If he wants to put him up, he can put him up, but we have rested our case.

Mr. Jenkins: If your Honor please, counsel for the defendants asks that the record show who the counsel for the State is?

The Court: The City Attorney, Hon. John W. Sholenberger.

Mr. Jenkins: Do you have any associates, Mr. Sholenberger?

Mr. Sholenberger: No.

Mr. Jenkins: If your Honor please, at this time, on behalf of the defendants, we should like to make a motion. I hand your Honor a copy of the motion.

The Court: Mr. Sholenberger, do you wish to make any observation about this motion?

Mr. Sholenberger: If your Honor please, I believe the motion is really being made for the record.

Mr. Jenkins: I'll say this, Mr. Sholenberger, that is one of the reasons for making the motion.

Mr. Sholenberger: If your Honor please, under the laws of the State of South Carolina, as I understand them, and under the Federal laws as I assume the Court of Appeals and the decisions of the United States Supreme Court, the proprietor of a place of business, whether it be food, drugs, sundries or whatever, is operating a private enterprise, and he has the right to refuse to sell or serve anyone, whether they be colored, whether they be white, whether their eyes are green, brown or some other color. If he doesn't like the color of their hair, the color of their eyes or doesn't like the [fol. 25] person individually, or for any reason that he sees fit, can ask them to leave his store or leave his premises, and if upon that request they refuse to leave, then they become a trespasser, and he can use such reasonable force as is necessary to remove them from the premises. In this instance, out of an abundance of precaution, the manager not desiring to use force himself, called upon a Peace Officer of the City of Columbia to remove the people who refused to leave his premises. I do not believe it's an inva-

sion of their Constitutional rights any more than I would think that if a proprietor of the store told me to get out, that he didn't want to serve me, he would be invading my Constitutional rights, because it is a private enterprise, has nothing to do with Governmental functions, we have no law that I know of that requires segregation in private establishments, and I think that under those circumstances the motion should be refused.

The Court: Jenkins, I would like to put this in the record as my opinion of the law. In the case of *Williams* v. *Howard Johnson's Restaurants*, the United States Court of Appeals, on July 16, 1959, Charles E. Williams, a Negro Attorney in the United States Revenue Service, entered a restaurant of Howard Johnson's located in the City of Alexandria, Virginia, and demanded service. He was refused service and subsequently brought an action against the Howard Johnson Restaurants, not only for himself but for all others similarly situated. He asked for a Declaratory Judgment in his favor on the grounds that he had been discriminated against because he was a Negro and moving in Interstate Commerce and also in violation of the 14th Amendment of the Constitution of the United States and the Civil Rights Act of the Federal Government of 1875. Now on motion of [fol. 26] the defendant's attorney the United States District Court dismissed the action and an appeal was taken to the United States Circuit Court of Appeals, Fourth Circuit, Circuit Judge Soper wrote the opinion in which he said: "Notwithstanding the substantial inconvenience and embarrassment to which persons of the Negro race are subjected in the denial to them of their right to be served in public restaurants, the dismissal of the suit was in accord with the decisions of the Supreme Court of the United States and other Federal Courts." The opinion further concludes that the Howard Johnson restaurant was not operating under any provisions of the Civil Rights Act of 1875 or under any Statute of the State of Virginia, or under any Ordinances of the City of Alexandria, and therefore was not a violation of any of the foregoing Statutes, so I'm going to overrule the motion on the ground that the United States Courts have held that any business has a right to serve anybody and to refuse to serve anybody, be they white or

colored. I think that's the law of the land today and I so rule.

Mr. Jenkins: If your Honor please, may I take it then that the motion is in the record and is a part of the record?

The Court: The motion is in the record, is a part of it and the motion is denied.

Mr. Jenkins: I ask this, your Honor, because I am not certain. Am I at liberty now to make certain comments with reference to the statement made by the City Attorney and by the Court, even though the motion has now been overruled?

The Court: Well, I think that would be purely academic because the Court has ruled what the interpretation of the law is. I think it would be purely academic. The motion is in the record and the refusal of the motion is in the record, [fol. 27] and my reasons for refusing it.

Mr. Jenkins: If your Honor please, at this time we would like to enter a formal plea for the defendants.

Mr. Sholenberger: Is this in the nature of an argument?

Mr. Jenkins: It's a plea which the defendants make to the charges against them.

The Court: In other words, they entered a plea at the outset of the trial of "Not Guilty".

Mr. Jenkins: This is in furtherance of the plea that we have already made, your Honor.

Mr. Sholenberger: Your Honor, this is not pertinent to the case.

The Court: They plead "Not Guilty" at the very start, and this is argumentative. This is a matter of argument.

Mr. Jenkins: Will the record show, your Honor, that an effort was made by these two defendants to introduce into the record, this plea?

The Court: Well, they entered a plea at the very outset, and I think this ought to be strictly a matter of argument and not a matter for the record.

Mr. Jenkins: Then if your Honor please, these defendants are invoking the protection of both the State Constitution of South Carolina and the Federal Constitution of the United States, and we believe for that reason that we should be allowed to enter into the record this plea which we have handed to the Court, in order to be sure that the

Constitutional grounds upon which these defendants rely, are brought squarely before the Court.

Mr. Sholenberger: Your Honor, they plead Not Guilty to the charge, and if he wants to argue this for a time, I think it's perfectly all right.

[fol. 28] The Court: You see, in Item No. 2, "That said Statutes are being used as a basis of unconstitutional State action." You are protected in your technicalities.

Mr. Jenkins: If your Honor please, orally then these defendants plead "Not Guilty" and further invoke Constitutional protection given them by Article 1, Section 5 of the Constitution of the State of South Carolina, and Constitutional protection— . . .

Mr. Sholenberger: I hate to interrupt. The Court has already overruled your motion. Is this additional argument?

Mr. Jenkins: This is not argument whatsoever. It's in support of the plea of "Not Guilty".

Mr. Sholenberger: If your Honor please, as I understand trial procedure, if he wants to make an argument at the close of the case. The City has closed its case. Now if he has testimony to present, he should present it and then at the close of that he has an opportunity to argue.

The Court: That's what my conception of the procedure is. Now Jenkins, I might say this, if the defendants want to testify, the Court will be glad to hear from them but if they don't want to testify, I'm ready to have argument pro and con.

Mr. Jenkins: If your Honor please, at this time we call as a witness, Mr. Malone, the manager of Eckerd's Drug Store.

DR. GUY MALONE, being duly sworn, testifies as follows:

Direct examination.

By Mr. Perry:

Q. Mr. Malone, I believe you are the manager of Eckerd's Drug Store in the City of Columbia?

[fol. 29] A. Yes.

Q. How long have you been manager of this store, sir?

A. Twenty-four years.

Q. Mr. Malone, will you please describe the Eckerd's drug store enterprise?

A. Well, it's a retail drug business.

Q. Is it a chain drug business?

A. Yes.

Q. Are there establishments located practically all over the United States?

A. No, mostly in the Southern states.

Q. It is located in different Southern states?

A. Yes.

Q. With stores in South Carolina and numerous other Southern states?

A. Yes.

Q. Mr. Malone, is Eckerd's in addition to being a drug store, is it also a variety store? That is, does it sell commodities other than purely drugs?

A. Well, we have different departments, sure.

Q. Will you tell us something about the departments, sir, briefly?

A. Well, we have the retail drug department, we have a cosmetic department, prescription department, and a luncheonette department.

Q. Mr. Malone, is the public generally invited to do business with Eckerd's?

A. Yes, I would say so.

Q. Does that mean all of the public of all races?

A. Yes.

Q. Are Negroes welcome to do business with Eckerd's?

A. Yes.

[fol 30] Q. Are Negroes welcome to do business at the lunch counter at Eckerd's?

A. Well, we have never served Negroes at the lunch counter department.

Q. According to the present policy of Eckerd's, the lunch counter is closed to members of the Negro public?

A. I would say yes.

Q. And all other departments of Eckerd's are open to members of the Negro public, as well as to other members of the public generally?

A. Yes.

Q. Mr. Malone, on the occasion of the arrest of these young men, what were they doing in your store, if you know?

A. Well, it was four of them came in. Two of them went back and sat down at the first booth and started reading books, and they sat there for about fifteen minutes. Of course, we had had a group about a week prior to that, of about fifty, who came into the store.

Mr. Perry: Your Honor, I ask, of course, that the prior incident be stricken from the record. That is not responsive to the question which has been asked, and is not pertinent to the matter of the guilt or innocence of these young men.

The Court: All right, strike it.

Mr. Sholenberger: Your Honor, this is their own witness.

Mr. Perry: We announced at the outset that Mr. Malone would, in a sense, be a hostile witness.

The Court: You haven't shown he is hostile.

Mr. Sholenberger: They put him on the stand.

The Court: And he is your witness.

[fol. 31] Mr. Perry: In any event, of course, we move to strike anything that's not responsive.

The Court: Well, I'm inclined to think that anything that would be germane to the general situation, would be responsive to the question.

Mr. Perry: Very well, sir.

Q. Now, Mr. Malone, on the occasion of the arrest of these young men, what specifically were they doing?

A. They were sitting in the booth reading.

Q. What general activity occurs in the booths?

A. Well, usually they come in to eat.

Q. Is this in the lunch counter section of Eckerd's drug store?

A. Yes, it is.

Q. And so, when a person comes into Eckerd's and seats himself at a place where food is ordinarily served, what is the practice of your employees in that regard?

A. Well, it's to take their order.

Q. Did anyone seek to take the orders of these young men?

A. No, they did not.

Q. Why did they not do so?

A. Because we didn't want to serve them.

Q. Why did you not want to serve them?

A. I don't think I have to answer that.

Q. Did you refuse to serve them because they were Negroes?

A. No.

Q. You did say, however, that Eckerd's has the policy of not serving Negroes in the lunch counter section?

A. I would say that all stores do the same thing.

Q. We're speaking specifically of Eckerd's?

A. Yes.

[fol. 32] Q. Did you or any of your employees, Mr. Malone, approach these defendants and take their order for food?

A. No.

The Court: He testified to that awhile ago.

Q. What, if anything, did you do?

A. I didn't do anything.

Q. Did any of your employees do anything?

A. No.

Q. Mr. Griffith, the Chief of Police of the City of Columbia, testified previously that pursuant to a request of someone in your store, he placed these—he first asked these young men to leave and then placed them under arrest. You may not have been in the courtroom at the time?

A. Yes, sir, I was here.

Q. I'll ask if you recall if that happened on the day of arrest of these young men?

A. Say that again?

Q. I'll ask you whether or not you or anyone in the management of your store, called the City Police?

A. I did.

Q. And asked that these young men be removed?

A. Yes, I did.

Q. And pursuant to your request, Mr. Griffith, I believe, came in?

A. That's correct.

Q. And subsequently the young men were placed under arrest?

A. That's correct.

[fol. 33] Mr. TALMADGE J. NEAL, being duly sworn, testifies as follows:

Direct examination.

By Mr. Jenkins:

Q. You are Taimadge J. Neal, one of the defendants in this case?

A. Yes, sir.

Q. I believe you are a student?

A. That's right.

Q. Attending which school?

A. Benedict College.

Q. What's your classification?

A. I'm a Sophomore.

Q. Are you a native Columbian?

A. Well, originally I was not. I moved here in '58.

Q. You have lived here since then?

A. Yes.

Q. Do you recall the events of the day leading up to your arrest in Eckerd's drug store in Columbia?

A. Yes, I do.

Q. Will you tell the Court just what you did with reference to Eckerd's drug store? Also, any events leading up to your arrest on the 14th day of March, 1960?

A. Well, I entered Eckerd's under the impression to be served, and I felt that I was within my rights to be served food there, inasmuch as it was open to the public, I consider myself as a part of the public and I felt it was my right to be served.

Q. Now you know that Eckerd's drug store is a retail drug store, catering to the public generally?

A. That's right.

[fol. 34] Q. Have you had occasion over a space of time you have been in Columbia, to make purchases in Eckerd's drug store?

A. Yes, I have.

Q. On one occasion, several occasions or numerous occasions?

A. Several occasions.

Q. Were you treated courteously?
A. Very courteously.
Q. Was any service denied you?
A. No, no service was denied me.
Q. On these occasions did you attempt to buy any food?
A. No, I didn't.
Q. You were in other departments in Eckerd's Drug Store?
A. That's correct.
Q. On the basis of your treatment previously in Eckerd's Drug Store, are you of the opinion that you were invited to come in as a member of the public and trade in that store?
A. That's right, yes.
Q. Did you have reason to believe that all departments of Eckerd's Drug Store catering to the public generally, would be open to you?
A. Absolutely.
Q. Does that include specifically the lunch department in Eckerd's Drug Store?
A. The lunch department, as well as others.
Q. Now on the day of March 14, 1960, you were accompanied by other companions in Eckerd's Drug Store?
A. That's right.
[fol. 35] Q. You entered with what intent? What was your intent in going into Eckerd's Drug Store?
A. To be served.
Q. To be served with what?
A. Food.
Q. You proceeded then to the food section of Eckerd's Drug Store?
A. That's correct.
Q. You took a seat?
A. Took a seat.
Q. At the time that you came into Eckerd's and took a seat, did you bump into anybody?
A. No, I didn't.
Q. Were you dressed somewhat similar to the way you are now?
A. Yes.
Q. I mean, you were clean?
A. Yes.

Q. To your knowledge, did you annoy anybody else by coming into Eckerd's Drug Store on that day?

A. No, I don't believe I did.

Q. Did anyone, prior to your getting to the food department, register any complaint about your presence in Eckerd's Drug Store?

A. No.

Q. Prior to your seating yourself at the booth in Eckerd's Drug Store, did anybody register any complaints for Eckerd's?

A. One of the salesmen came with a chain posting a "No Trespassing" sign but it was not posted. He had it in his hands like this (indicating).

Q. Was this chain or rope eventually put up in Eckerd's Drug Store while you were there?

A. After we were seated.

[fol. 36] Q. That was put up after you were seated?

A. Yes.

Q. When you seated yourself in the booth, do you remember what booth it was?

A. Booth No. 13.

Q. Can you give generally the layout of Booth No. 13 with reference to the food service department of Eckerd's?

A. This booth, along with others, is located in the middle of the aisle and this is the first booth.

Q. The first booth in the middle aisle?

A. Yes.

Q. Are there seating arrangements on the right side of this booth, the right of the aisleway of this booth?

A. Yes.

Q. Tables I believe?

A. Tables and booths.

Q. To the left of this booth I believe there is a lunch counter with stools?

A. Yes.

Q. What time did you go into Eckerd's?

A. We entered Eckerd's around five after eleven.

Q. Did you look around you when you sat down in this booth in Eckerd's Drug Store?

A. Yes, after we were seated we glanced around, or I did.

Q. You looked around in the booth?

A. Yes.

Q. Did you have any opportunity to observe anyone else in the food service department of Eckerd's?

A. I did.

Q. Was there anyone else sitting in the area of Eckerd's Drugs, which is used generally for the service of food?

[fol. 37] A. Yes there was.

Q. Employees?

A. No I don't think so.

Q. Did you see any employees of Eckerd's Drugs in that department?

A. Yes.

Q. Did you see any persons sitting at booths in that area?

A. Yes.

Q. Are you positive of that?

A. Positive.

Q. Were they Negro?

A. White.

Q. Were they sitting in booths?

A. Booths.

Q. Did you see anyone sitting at the lunch counter on any of the stools at that time?

A. I'm not sure. I wouldn't say.

Q. Do you recall how many persons you saw seated in Eckerd's Drugs in that food service department?

A. Four or five I would say.

Q. Did you pay any particular attention to what they were doing?

A. They were served food. What food they had I don't know.

Q. Did you observe anyone serving them food?

A. Yes I did.

Q. You saw waitresses bringing them food?

A. Yes I did.

Q. Did any waitress or any other employee of Eckerd's approach you to take an order from you?

A. No.

[fol. 38] Q. Had any employee of Eckerd's approached you to take an order for food, would you have given an order for food?

A. Yes I would have.

Q. You are positive it was your intent to be served when you went into Eckerd's?

A. That's right.

Q. You are positive that you believe you have a right as a member of the general public, to service there?

A. That's correct.

Q. Now while waiting service, what did you do?

A. Well, I had my book. One book, of course, and in this book was a Bonanzagram puzzle, and I opened the book and read a couple lines and then I took my Bonanzagram from the book and I pretended to work it out, and I was observing the book and the Bonanzagram.

Q. How old are you Neal?

A. Twenty.

Q. Have you had occasion at other times to eat in public eating places, other than March 14th, 1960?

A. In South Carolina?

Q. In South Carolina?

A. Yes.

Q. Have you eaten in the school cafeteria at school?

A. Yes.

Q. Have you ever eaten at a public restaurant?

A. Yes.

Q. On one occasion, numerous occasions or how many occasions?

A. Well, not too many times but I have eaten.

Q. Do you recall whether you ever had to wait for someone to come up and ask to take your order when you went in these places?

[fol. 39] A. No I haven't had to wait.

Mr. Sholenberger: If your Honor please, I've let this go on for awhile. I don't know what other stores have to do with this particular case. I know he wants to get certain things into the record and that's why I have let him go on for a certain length of time, but I really don't think it's pertinent to the issue in this case because we are dealing here with one particular store and one particular day, one particular occasion, one particular cause of action.

(Question withdrawn.)

The Court: Jenkins, I've let you go far afield so far but in other words, confine your questions to the direct issue involved in this instance.

Q. Getting back now to March 14th in Eckerd's Drug Store, did anyone other than you, come into this area while you were there?

A. Yes.

Q. Who?

A. Mr. Carter.

Q. Did anyone else come in for food service, to your knowledge?

A. I'm not sure.

Q. You don't know how long the other persons who were seated in these booths, had been there?

A. No I do not.

Q. Do you know how long after you got there, that they were actually served food?

A. No I don't.

Q. You did nothing then except sit there and read your book and work your Bonanzagram puzzle. Is that right?

A. Yes.

[fol. 40] Q. Did anyone approach you while you were sitting there?

A. No one.

Q. Did any employee of the store approach you?

A. No, not until the Assistant Chief and the Manager came. No one approached me.

Q. Prior to Chief Griffith and Mr. Malone coming to you, no other employee of the store had approached you with reference to why you were sitting there?

A. That's right, no.

Q. You were in court when Mr. Malone testified as to what took place?

A. That's right.

Q. Is that generally what happened?

A. Yes, generally.

Q. So then Mr. Malone approached you and advised you that you would not be served?

A. That's right.

Q. And for you to leave?

A. That's correct.

Q. Did he give you any reason as to why you were not served?

A. No, he just said: "We are not going to serve you here, you will have to leave."

Q. Did you see him approach anyone else who was seated in that department and request them to leave?

A. No, I didn't.

Q. After Mr. Malone advised you to leave, Chief Griffith then advised you to leave. Is that correct?

A. Yes, he did.

Q. Only after you had been advised to leave, by Mr. Malone?

A. We were told.

[fol. 41] Q. You then left with Chief Griffith?

A. That's correct.

Q. Were you under arrest at the time you left the store?

A. Yes.

Q. Now while in Eckerd's store, were you loud and boisterous?

A. Not at all.

Q. Were you profane and vulgar?

A. No, I was not.

Q. Was there any riotous conduct on your part?

A. No, sir.

Q. Were you disorderly in any manner?

A. No, sir.

Q. State to the Court whether or not you thought at the time you entered the food service department of Eckerd's Drug Store, that you had a legitimate constitutional right to be there?

A. Yes, I felt then and I feel now, that inasmuch as their services are open to the public and that I am able to buy goods in other departments, I feel that I have a right to buy food.

Cross examination.

By Mr. Sholenberger:

Q. I think in answer to your counsel's question you said you entered Eckerd's with the intention of attempting to have food served to you. Is that right?

A. Correct.

Q. What kind of a meal were you going to buy?

A. Well, anything that would suit my appetite, sir.

Q. Well, did you look at the menu?

A. No, no one brought the menu to us and there was none on the table.

[fol. 42] Q. Isn't there usually one on the table?

A. I didn't see one, sir.

Q. So you definitely say you went there for the purpose of ordering food and being served?

A. That's right.

Q. Well, you wouldn't deny that you didn't have a penny on you, would you? You wouldn't deny that?

A. No, I wouldn't.

Q. It's a fact that you didn't have a penny on you?

A. Well, I had some silver and a greenback but not a penny.

Q. You say you had some money?

A. I had some money.

Q. I'm putting you on notice now that I'm going to contradict that. How much money do you say you had?

A. Oh, in the neighborhood of three dollars.

Q. I'm warning you again, I'm going to contradict you on that. I ask you again, did you have any money on you?

A. Yes.

Q. Now then, how long had you been seated before Mr. Malone asked you to leave?

A. Around fifteen minutes.

Q. And he did ask you to leave?

A. Yes, he told us.

Q. He told you both to leave?

A. Yes.

Q. He said you would not be served?

A. Correct.

Q. How many times did he tell you that?

A. I remember him telling us once, and then Assistant Chief Griffith—

[fol. 43] Q. You don't remember Mr. Malone telling you twice?

A. No.

Q. You heard his testimony?

A. Yes, I did.

Q. He said he asked you twice?

A. Yes, he did say that.

Q. Now Mr. Griffith asked you how many times?

A. Twice.

Q. Did you leave when the manager asked you?

A. No.

Q. You continued to sit there?

A. Yes.

Q. And after Chief Griffith asked you to leave the first time, did you leave?

A. No.

Q. You continued to sit there?

A. Correct.

Q. As a matter of fact, wasn't it your intention when you went there, to be arrested?

A. I refuse to answer that, sir.

Q. Why? Wasn't that your intention, to be arrested?

A. I refuse to answer that.

Mr. Jenkins: If your Honor please, I suggest that the Court instruct the witness that he must answer any question put to him by the City Attorney.

The Court: That's exactly right, you will have to answer counsel's questions.

A. Yes.

By Mr. Sholenberger:

Q. In other words, it was your intention to be arrested?

A. Yes.

[fol. 44] Q. Now, isn't it true that before you went to Eckerd's, you had been to a meeting of your folk

A. Yes.

Q. When was that?

A. This was the 14th that the incident took place. It was Monday. It was Sunday afternoon that we met.

Q. And at that meeting wasn't it agreed that you and other people would go to different stores for the purpose of being arrested?

Mr. Jenkins: If your Honor please, we object on the ground that it is not relevant to this matter. The witness had a perfect right to go in if he pleased. He had a perfect right at that meeting to formulate any legitimate plan and that has absolutely nothing to do with the charge made against him here.

Mr. Sholenberger: Then I don't see why he can't answer. If your Honor please, this goes to the very purpose of showing the intention behind his action in going to Eckerd's store.

The Court: He admitted that he expected to be arrested. He went there for the purpose of being arrested. I think it's germane to the question.

Mr. Jenkins: If your Honor please, if the witness has already stated to the Court his purpose for going, then the fact that he went to a meeting some time previous, has nothing to do with this case. He was candid in admitting why he went there.

The Court: Correct, but I think Jenkins, it shows a concerted effort and I believe the question is admissible. Go ahead and answer it.

Mr. Sholenberger: That's the essence of the trespass.

[fol. 45] Q. At this meeting was it agreed by you and others that you were going to Eckerd's store in the City of Columbia, for the purpose of being arrested?

A. No.

Q. What was the agreement?

Mr. Jenkins: We object to that, your Honor.

The Court: Mr. Sholenberger, I don't believe that's necessary. He denied the fact that he agreed to it so I don't think that would be admissible.

Q. Were you under instructions from anyone to go to Eckerd's for the purpose of being arrested?

Mr. Jenkins: We object to that question. The witness already stated why he went there.

Mr. Sholenberger: I asked a different question this time, if he was instructed.

Mr. Jenkins: If your Honor please, this witness is not charged with conspiracy. He's charged with a definite offense. He stated why he went.

The Court: I'm going to allow it in, subject to objection.

A. No.

Q. You are sure that you were not instructed by anyone, no one told you to—

A. That's right.

Q. But you did attend this meeting on Sunday?

A. Yes.

Q. Well, I imagine you and Bouie agreed to do this, didn't you? Bouie was with you?

A. We were together.

Q. You all agreed among yourselves that you were going to do this?

A. Bouie and I did.

[fol. 46] Q. I believe there were two other boys with you, weren't there? Who went to the store?

A. Yes.

Q. They didn't sit down?

A. That's correct.

Q. Well, they were in agreement on this, weren't they, the other two boys?

A. I don't know.

Q. You know who they were?

A. Yes.

Q. They went there with you?

A. That's right.

Q. And you don't know whether it was their intention to do the same thing you did?

A. That's right, I don't know.

Q. Do you remember what happened to you when you came down here to Police Headquarters?

A. Yes.

Q. What did they do?

A. Well, we went to the desk and we were asked our names, our addresses and we were frisked.

Q. Well, do you recall signing a slip, a custody slip, for the things that were taken off of you?

A. Yes.

Q. I hand you this slip. Is that your signature?

A. Yes, it is.

Q. All right, doesn't that slip—

Mr. Sholenberger: I would like to introduce this in evidence.

(Custody Slip offered and received in evidence as Exhibit No. 2.)

Q. All right, sir, you say this is your signature on this paper, and I want you to look at that and see if it says [fol. 47] that you had any money on you at all when you were arrested?

A. It says "no money" here.

Q. And you signed it, didn't you?

A. Yes, I did.

Q. Yet you testified a little while ago that you had about three dollars?

A. That's correct.

Q. But you signed that at the time and that's your signature, and it says that you had no money?

A. This was signed just as we were getting ready to leave the jail.

Q. That you had no money?

A. I had money.

Q. Where did it go? Why did you sign it if you had some money?

A. I asked the Desk Sergeant that I could keep my money in my pocket so that I could buy goods, and that I did.

Q. Is this a copy of a paper that you had on you?

A. I didn't have this on me at the time.

Q. A copy I say?

A. Yes.

Q. You had that on your person?

A. Not at the time that it was taken. You got the copy but it was not on me.

Q. At the time you were arrested, you had something similar to this?

A. It was in my possession.

By Mr. Jenkins:

Q. Neal, have you ever been arrested before?

A. No, I haven't.

Q. You wouldn't know what the general procedure is when a person is arrested, would you?

[fol. 48] A. I sure wouldn't.

Q. Did you read that slip that you signed, before you signed it?

A. Well, they had items checked and the items that were checked, I did have them.

Q. Now you've testified that you did, in fact, have some money when you were arrested?

A. That's correct.

Q. Do you recall whether or not, while in jail, you bought some articles?

A. I did buy some.

Q. What did you buy?

A. One pack of cigarettes, one cinnamon bun and a Coca-Cola.

Q. Did you pay for it?

A. Yes, I did.

Q. With what?

A. With my money.

Q. Was that money you brought in jail with you?

A. That's right.

The Court: Any further testimony on behalf of the defendants?

Mr. Jenkins: Yes, if your Honor please, I would like to call to the stand, Simon Bouie.

SIMON BOUIE, being duly sworn, testifies as follows:

Direct examination.

By Mr. Perry:

Q. Your name is Simon Boure?
A. Yes, sir.
[fol. 49] Q. How old are you?
A. I'm twenty years old.
Q. Where do you live?
A. I live in Columbia, South Carolina.
Q. What is your occupation?
A. I do not have a job at the present time.
Q. Are you a student?
A. Yes, sir.
Q. What school are you a student at?
A. I attend Allen University.
Q. What's your classification?
A. A Junior.
Q. Now on March 14th I believe you were arrested while on the premises of Eckerd's Drug Store?
A. Yes, sir.
Q. What department of Eckerd's were you visiting at the moment?
A. I was visiting the lunch counter in the rear of the store.
Q. Why were you at the lunch counter?
A. Because I wanted to be served.
Q. Now I believe that you went in with the young man who just finished testifying?
A. Yes, sir.
Q. Did the two of you sit at the same booth or counter?
A. Yes, sir.
Q. How long did you sit at the lunch counter?
A. In all? I would say about twenty minutes before I was arrested.
Q. At what point after you had arrived, did the manager or other employee of Eckerd's come in to have anything to say to you? Had you been there five minutes or ten minutes or fifteen minutes?

[fol. 50] A. We were there approximately fifteen minutes I would say when the manager along with Chief Griffith, came up to us.

Q. Did the manager not come over to you before Mr. Griffith came?

A. No, sir.

Q. The two of them came together?

A. Yes, sir.

Q. Who spoke to you first?

A. The manager of the store, Mr. Malone.

Q. What did Mr. Malone say to you?

A. I don't remember his exact words, but he said something to the effect: "Boys, I will not serve you".

Q. What happened then?

A. Then following that, Chief Griffith said: "The manager said he's not going to serve you, what are you going to do"?

Q. He asked: "What are you going to do?"

A. Yes, sir.

Q. Then did you give him a reply?

A. I can't recall. I think we just sat there.

Q. What did Mr. Griffith or the manager then do?

A. Following then, Mr. Griffith again the second time said: "The gentleman is not going to serve you, will you leave", or something to that effect, and he said: "I will have to put you in jail" and then at the time I asked him: "For what?" What was he charging me with?

Q. Did he reply?

A. Are you talking about Chief Griffith?

Q. Yes.

A. No, Chief Griffith didn't give me any charges at all.

[fol. 51] Q. He did state that you were under arrest, however?

A. I was under arrest.

Q. Were you sitting or standing then?

A. I was sitting at that time.

Q. When Chief Griffith said: "You are under arrest" what, if anything, did you then do?

A. Well, when he said that I was under arrest, I asked him orally why, and physically I began to gather my books. I had a litgrature book at the time, one of these around

$10.00 books, which is huge in size, and I pulled it towards me.

Q. Did you make any effort to arise?

A. Yes, sir.

Q. At the time you made such an effort, what was Chief Griffith doing?

A. Chief Griffith was standing there, and when I was making an effort to come, to get up to go, he didn't lift me. I know the difference between lifting and snatching. He snatched me from the booth. I had my book in my hand at the time he snatched me. I had my book in my hand, so I gathered my book when he snatched me, very briefly, and he gave me the regular patting down, I don't know what you call it, and following then he grabbed me by the seat of my pants and a gentleman as large as this gentleman, with a fellow my size and very timid, I couldn't have run. People were there looking at me. There were reporters at the time at the front door. I couldn't do anything but go with the gentleman, and the only remark I said to the gentleman, after he pulled me by my belt, I said to him: "That's all right, Sheriff, I'll come on" because I didn't want to make any scene because I knew the reporters were there and I [fol. 52] didn't want anything to even look violent. Those were the only remarks I made to him after he pulled me by my belt.

Q. I'll ask you whether or not you resisted Chief Griffith in any manner?

A. Oh, no, sir.

Q. When he placed you under arrest?

A. No, sir.

Q. I'll ask you whether or not you went along with him voluntarily and without the necessity of the assistance which he gave you?

A. Repeat that again?

Q. I'll ask you whether or not you went along with Chief Griffith voluntarily?

A. Yes, sir, I went along with him voluntarily.

Q. I'll ask you whether or not it was necessary for Chief Griffith to apply force to take you with him?

A. Oh, no, sir. No, sir.

Q. Going back to the reasons for your going to Eckerd's, for what purpose did you go?

A. My purpose in going was because I wanted to be served.

Q. Have you done business with Eckerd's before?

A. For nineteen years.

Q. Have you generally shopped in the other departments of Eckerd's?

A. Yes, I have.

Q. Was your business welcomed?

A. Oh, certainly.

Q. Now I believe you have heard the testimony of Mr. Malone, who has said that at this time it is not the policy of Eckerd's to serve Negroes?

A. Yes, sir.

Q. Are you a Negro?

A. Yes, sir.

[fol. 53] Q. Have you observed whether Eckerd's follows the policy announced by Mr. Malone, that is, of not serving Negroes?

A. Yes, sir.

Q. At the food counter?

A. Yes, sir.

Q. Mr. Malone has testified about the size of Eckerd's. Is it a pretty large drug store?

A. Yes, sir.

Q. Is its lunch counter a large business place?

A. Yes, sir, it is.

Q. Do members of the public generally go to Eckerd's lunch counter for food?

A. Yes, sir.

Q. Do they go in large numbers?

A. I can't answer that, sir.

Q. About what time of day was it that you went into Eckerd's?

A. It was exactly two minutes after eleven and by the time we reached the booth it should have been exactly four minutes. It took us about two minutes.

Q. I believe this would not have been at the regular lunch hour?

A. No, sir.

Q. It may have been perhaps an hour before the big noonday rush?

A. Yes, sir.

Q. Do you know anything about the breakfast hour at Eckerd's lunch counter and when it comes to a close?

A. No, sir, I wouldn't know that.

Q. Were there many customers eating and seated around the lunch counter and the booths when you went in?

[fol. 54] A. I observed at that time there were a goodly number of persons there at the time.

Q. Would you make any effort at saying how many people were there?

A. No, I wouldn't.

Q. Were any of the persons present, other than you and Neal, Negroes? Other than you and Neal, were any other Negroes present at the lunch counter?

A. No, sir.

Q. In the lunch room rather?

A. No, sir.

Q. All of the persons were white?

A. Yes, sir.

Q. Were you dressed similar to the way you are dressed now?

A. The exact thing.

Q. Were you clean?

A. Yes, sir.

Q. Were you obscene in any way?

A. I don't think so.

Q. Did you use any profanity?

A. Oh, no, sir.

Q. Were you vulgar in any manner?

A. No, sir.

Q. Did you engage in any riotous conduct?

A. Definitely not.

Q. Did you in any manner brush against any other customer, or any other member of Eckerd's firm?

A. No, sir.

Mr. Sholenberger: Judge, I have let him go a long way but these are very leading questions.

The Court: I believe he has covered that pretty fully.

[fol. 55] Q. Now in going into Eckerd's Drug Store state whether or not you thought that you had a right to go and be served at the lunch counter?

A. Definitely sir. I was served previously in all of the other departments of Eckerd's and I felt that I had a legitimate right to be served in the lunch room.

Cross examination.

By Mr. Sholenberger:

Q. I'm not going to ask you many questions. You state that you went there for the purpose of being served?

A. Yes, sir.

Q. Didn't you also go there for the purpose of being arrested?

A. Oh, yes, if it took that.

Q. You and Neal agreed to that?

A. Oh, no, I didn't make any type of agreement with Mr. Neal.

Q. But you both understood—

A. I saw Mr. Neal and we were going to the lunch counter together.

Q. Did you have any money on you?

A. Yes, sir.

Q. How much did you have?

A. I can't rightly remember but I had enough to get a pretty fine order for a schoolboy.

Q. I hand you this Custody Slip. Is that your signature on it?

A. Yes, sir. Here is the money that I gave to the gentleman here at the desk. Right here you are talking about? I had a one dollar bill, plus I had some change too.

[fol. 56] Q. Now when Mr. Malone told you he was not going to serve you, he asked you to leave?

A. Yes, sir.

Q. Did you leave?

A. No, sir.

Q. Did he ask you again to leave?

A. No, sir.

Q. You deny that he asked you to leave, a second time?

A. No, sir, the first time he asked me to leave, then Chief Griffith came.

Q. But you did not leave when he asked you?

A. No, sir. Excuse me. Let me correct that. He didn't ask me to leave. He said: "I'm not going to serve you".

Q. Your friend here who was with you, testified that he asked him to leave, and you were right there?

A. If I'm not mistaken, he stated: I'm not going to serve you" and before he could get through, the Chief said: "Are you going to leave?"

Q. Are you sure of that? Didn't Mr. Malone ask you to leave twice? Are you sure about it?

A. I'm almost positive.

Q. But you're not sure are you?

A. I'm almost sure of what he said.

Q. You heard your buddy say that Malone asked him twice?

A. Yes, sir. He could have asked him twice.

Q. He could have asked you twice, too, couldn't he?

A. No, sir, he didn't ask me twice.

Q. But you're not sure about whether he asked you one time?

A. Oh, I'm positive about that.

[fol. 57] Q. He did ask you one time?

A. Yes, sir.

Q. And you didn't leave?

A. No, sir.

Q. Then Chief Griffith asked you to leave?

A. Yes, sir.

Q. Did you leave?

A. No, sir.

Q. So he asked you a second time to leave?

A. Yes, sir.

Q. Did you leave?

A. No, sir.

Q. In other words, that's when he pulled you up out of the seat?

A. Yes, sir.

Q. And he frisked you?

A. Yes, he did.

Q. And he grabbed you by the belt?

A. Yes, sir.

Q. Now, after he grabbed you by the belt, didn't you tell him to take his hands off you?

A. Oh, I didn't tell the Chief that. Definitely not.

Q. Didn't you try to push back away from him?

A. Oh, sir, as big as that man is, if you want to go through the procedure and see how difficult it would be, I've never been arrested before, I've never been jerked by my pants as some criminal before. He came and he pulled me by the seat of my pants. Now, normally I couldn't do anything but follow him. He pushed me.

Q. You deny that you tried to get away from him?

A. Yes, sir, I deny that.

Q. Or that you pushed back against him?

A. I deny that.

[fol. 58] Q. Did you meet with this group that Neal testified about?

A. No, sir, I didn't meet with that group.

Q. You didn't meet with them on Sunday?

A. No, sir.

Q. Didn't you tell Chief Griffith: "Don't hold me."?

A. After he was ready to make a scene like he anticipated he wanted a scene, and I said—

Q. Just answer my question. Did you say that or not?

A. I told him these exact words; I said: "You don't have to hold me. I will come, sir."

By Mr. Perry:

Q. And having stated your reply to the questions of the City Attorney, that you were prepared to be arrested if need be, state whether or not you were willing to go along with Chief Griffith?

A. Yes, sir.

Q. And also on the question of the money that you had in your pocket, did you make any purchase of food while you were in the city jail?

A. Yes, sir, I bought a pack of cigarettes, a Coca-Cola and another gentleman that was there in the cell, because they put me in a cell, and we had to let the persons who

were out there, and I gave him also a pack of cigarettes and a Coca-Cola.

Q. Where did you get the money to pay for that?

A. Well, I had it when I came to jail.

Q. Is that the money that appears on the slip?

A. Yes, sir.

By Mr. Sholenberger:

Q. After Mr. Malone and Mr. Griffith asked you to leave, why didn't you leave?

A. Mr. Malone didn't ask me to leave.

[fol. 59] Q. Just awhile ago you testified that he did ask you to leave?

A. Mr. Malone said he would not serve me. That's what I said.

Q. In answer to one of my questions you said he asked you to leave?

A. No, sir, he didn't.

Q. Why didn't you leave after Mr. Griffith asked you to leave?

A. I was attempting to leave but I wanted to know what I was to leave for.

Q. Well, didn't you testify that he asked you to leave twice, and you didn't leave after the first time and you didn't leave after the second time? Why didn't you?

A. Because I wasn't doing anything. I was only waiting to be served.

Q. Isn't it true you wanted to be arrested?

A. It was all in his judgment to arrest me. That was his problem.

Q. That's what you went there for, wasn't it?

A. No, sir, I went to be served.

Q. And to be arrested?

A. No, sir, I didn't go to be arrested.

Q. Do you change your testimony on that?

A. I don't change my testimony on that.

(Defendants rest.)

Officer Isaac F. Gardner, having been duly sworn, testifies as follows in Reply:

By Mr. Sholenberger:

Q. Mr. Gardner, you were the man on duty back here when Talmadge J. Neal was brought in?
[fol. 60] A. Yes, sir, I was the Housekeeper on duty at the time he was brought in.
Q. Did he have any money on him?
A. He had a one dollar bill.
Q. Neal I'm talking about?
A. Neal? He didn't have any money at all.
Q. Did he sign this custody slip?
A. That's right, sir.
Q. Does that show any money?
A. No, sir, it doesn't. He didn't have any money and I informed him at the time. I said: "Now you don't have any money at all."

By Mr. Jenkins:

Q. Would you know, Mr. Gardner, whether or not the defendant Neal made any purchases while in jail?
A. No, sir, I don't.

State Rests in Reply

(State rests in reply.)

(Testimony closed.)

Mr. Jenkins: If your Honor please, the defendants have certain motions which at this time they would like to make and enter into the record. In view of the fact that these motions are written out, I would ask the Court if you would dispense with the necessity of reading them and merely show that they are entered into the record.

The Court; All right.

Mr. Sholenberger: I might ask, are these motions along the same general line as the previous motions?

Mr. Jenkins: Along the same general lines but perhaps a little more elaborate, Mr. Sholenberger. They are of the same nature however.

The Court: I would like to state for counsel for defendants that the motions are overruled.

[fol. 61] Mr. Jenkins: If your Honor please, the defendants would like to introduce certain motions for Arrest of Judgment, or in the alternative, for a New Trial, on the grounds set forth in the motions.

Mr. Sholenberger: Judge, I might state that the Motion for Arrest of Judgment is proper at this time but certainly they can't ask for a New Trial at this time.

Mr. Jenkins: We must admit that you are correct. We respectfully withdraw that part of the motion which asks for a New Trial at this time, but we will ask leave to allow the Motion for Arrest of Judgment to remain in the record.

The Court: The motion is overruled, insofar as it is covered by the other motions made.

OPINION AND JUDGMENT

To the Defendants:

The Court: I'm prepared to hand down an opinion. In the case of *Stramack* (?) v. *Walker*, 149 Southeastern, Mr. Justice Cothran, who is one of the ablest members of the Supreme Court of this State, wrote the opinion of the Court and that was decided on August 27, 1929. This was a suit for damages where an individual remained in a building after having been ordered by the owner to depart. He refused to leave the building and was forcibly ejected by the owner. In this case Mr. Justice Cothran, speaking for the Court, said: "The law is well settled as thus expressed in our own case of *State* v. *Lazarus*, 1, Mills, Constitution 34: "The Prosecutor having business to transact with him, had a right to enter his house but if he remained after having been ordered to depart, might have been put out of the house. The defendant using no more violence than was necessary to accomplish this object and showing to the satisfaction of the Court and the jury, that this was his object." Now, I might add that in Second [fol. 62] Ruling Case Law, 559, the law is stated very succinctly and very properly: "It is a well settled principle that the occupant of any house, store or other build-

ing, has the legal right to control it and to admit whom he pleases to enter and remain there and that he also has the right to expel from the room or building anyone who abuses the privilege which has been thus given to him. Therefore, while the entry by one person on the premises of another may be lawful by reason of express or implied invitation to enter, his failure to depart on the request of the owner will make him a trespasser and justify the owner in using reasonable force to eject him." That's a quotation from Ruling Case Law and I think that law is well settled in South Carolina and I might say in the United States, and furthermore, under the case which I stated some time ago during the early part of the morning, the Circuit Court of Appeals has held that the private owner of a business has a perfect right to control it and to do business with anybody he pleases to do business with. That applies not only to Howard Johnson but I think in the case involved, which is Eckerd's, they've got a perfect legal right to do business and transact business with anybody they want to do business with, and if they invite them to leave and request them to leave and if they refuse to do it, then they have every right under the law to use such force as may be necessary to eject them.

It is therefore the opinion of this Court that the defendants are guilty, and the fine of the Court against Simon Bouie is $100.00 or 30 days, for trespassing, and I suspend $24.50 of that, and on resisting arrest, the fine of the Court is $100.00 or 30 days, of which amount the sum of $24.50 is suspended, said fines to run consecutively.

[fol. 63] The judgment of the Court is in the case of Talmadge J. Neal, the fine of the Court is that he pay a fine of $100.00 or serve 30 days, provided that the sum of $24.50 is suspended.

RENEWAL OF MOTION FOR ARREST OF JUDGMENT AND FOR A NEW TRIAL AND OVERRULING THEREOF

Mr. Jenkins: If your Honor please, on behalf of these two defendants, I would like to renew the Motion for Arrest of Judgment and for a New Trial, on the basis of the motions previously handed to the Court. It is embodied

in the same motion, if your Honor please. Further, at this time, we would like to renew all previous motions that have been made here today.

The Court: I will decline and overrule all motions.

Mr. Jenkins: If your Honor please, at this time we would like to note an Appeal in this case.

The Court: The Appeal Bond in the case against Simon Bouie will be $300.00 and the Appeal Bond against Talmadge Neal will be $200.00.

I hereby certify that the foregoing is a true and correct transcript of the stenographic notes of testimony taken by me at the above trial.

Jos. C. Cordell, Reporter.

The defendants move to dismiss all charges against them, and each of them, on the grounds that the statutes, *i.e.*, State Code No. 16-386, as amended, trespass, and State Code No. 15-909, breach of peace, though constitutional on their faces, are, as to these defendants, unconstitutionally applied, thus denying to these defendants due process of law and equal protection of the laws, in violation of the 14th Amendment of the United States Constitution, and Article 1, Section 5 of the Constitution of South Carolina. [fol. 64] The grounds for said motion being that the evidence proves:

(1) That said statutes are being used to back up unconstitutional State action by the use of the State's police power to aid a private business catering to the general public to discriminate against these defendants solely on the basis of race and color.

(2) That said statutes are being used as a basis of unconstitutional State action in that the State police power is provided to eject the defendants from a public place where he has been invited and has a legal right to go, and to arrest them and deprive them of their liberty solely on the basis of race and color.

(3) That said statute is being used as a basis of unconstitutional State action in depriving said defendants of their liberty in that they are singled out as being ejected and arrested solely on the basis of race and color, while others are allowed to remain where the defendants had the right to be.

The defendants move for a dismissal of all charges against them for the reason that the evidence shows that the said defendants were attempting to exercise their common law right to free access to the common market and that to be denied that right by the State by being ejected from the business places described in the record and subjected to arrest by the State solely on the basis of race and color is a denial of the equal protection of the laws and due process of law as guaranteed by the 14th Amendment of the United States Constitution and Article 1, Section 5 of the South Carolina Constitution.

[fol. 65] The defendants move for the dismissal of all charges against themselves, and each of them, on the ground that the operator of the private business catering to the general public invited them in and afterwards discriminated against them in the sale and purchase of wares and services solely on the basis of race and color and that the State, through the use of its police as its agents, cannot assist in this unequal treatment; for to so assist the private business operator by the ejectment and arrest of the defendants the State denies to said defendants the equal protection of the laws in violation of the 14th Amendment of the United States Constitution.

The defendants move the Court to dismiss the charges against them, and each of them, on the ground that the Court lacks jurisdiction to try these defendants as charged. The evidence shows that the defendants were arrested and charged by police officers, agents of the State, not for the commission of any crime as charged, or any other for that matter, but in aid of private discrimination against the defendants, based solely on race and color.

This Court, also an agent of the State, cannot use its authority to aid in the enforcement of a private discrimination based solely on race and color. For this Court to sub-

ject the defendants to fine and conviction under the facts as herein outlined would be without due process of law and would deny to the defendants the equal protection of the laws as guaranteed the defendants by the 14th Amendment of the United States Constitution.

The defendants move for a dismissal of all charges against them on the ground that for the State to stand idly by and allow a private individual in public business to discriminate against the defendants on the basis of race [fol. 66] and color alone and then for the State to back up this discrimination by State action in ejecting, arresting and subjecting to trial these defendants is a denial of due process of law and a denial of the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution.

The defendants move to dismiss the charges of trespass and breach of the peace, in violation of State Statutes Section 16-386 and 15-909, on the ground that the evidence proves that the defendants were merely attempting to exercise their rights as business invitees of a business catering to the general public to exercise the freedom of being served by said business on a nondiscriminating basis without regard to race and color and in so doing were not guilty of any crime.

Further, the defendants move to dismiss all charges against them on the ground that to deprive them of their liberty to enter such a business establishment as the record describes and be served as others, and that to be ejected and arrested by agents of the state—the police—solely on the basis of race and color, and to be singled out as the only persons ejected while others remain, is a denial of due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution.

The defendants move for arrest of judgment or in the alternative for a new trial on the ground that the operator of the private business catering to the general public invited them in and afterwards discriminated against them in the sale and purchase of wares and services solely on the basis of race and color and that the State, through the use of its police as its agents, cannot assist in this unequal

treatment; for to so assist the private business operator by the ejectment and arrest of the defendants the State [fol. 67] denies to said defendants the equal protection of the laws in violation of the 14th Amendment of the United States Constitution.

The defendants move for arrest of judgment or in the alternative a new trial on the ground that the evidence proves that the defendants were merely attempting to exercise their rights as business invitees of a business catering to the general public to exercise the freedom of being served by said business on a nondiscriminating basis without regard to race and color and in so doing were not guilty of any crime.

Further the defendants move to dismiss all charges against them on the ground that to deprive them of their liberty to enter such a business establishment as the record describes and be served as others, and that to be ejected and arrested by agents of the state—the police—solely on the basis of race and color, and to be singled out as the only persons ejected while others remain, is a denial of due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution.

The defendants move for arrest of judgment or in the alternative a new trial on the grounds that the Court lacks jurisdiction to try these defendants as charged. The evidence shows that the defendants were arrested and charged by police officers, agents of the State, not for the commission of any crime as charged, or any other for that matter, but in aid of private discrimination against the defendants, based solely on race and color.

This Court, also an agent of the State, cannot use its authority to aid in the enforcement of a private discrimination based solely on race and color. For this Court to subject the defendants to fine and conviction under the facts as herein outlined would be without due process of law and [fol. 68] would deny to the defendants the equal protection of the laws as guaranteed the defendants by the 14th Amendment of the United States Constitution.

The defendants move for arrest of judgment or in the alternative for a new trial on the ground that the statutes,

i.e., State Code No. 16-386, as amended, trespass, and State Code No. 15-909, breach of peace, though constitutional on their faces, are, as to these defendants, unconstitutionally applied, thus denying to these defendants due process of law and equal protection of the laws, in violation of the 14th Amendment of the United States Constitution, and Article 1, Section 5 of the Constitution of South Carolina.

The grounds for said motion being that the evidence proves:

(1) That said statutes are being used to back up unconstitutional State action by the use of the State's police power to aid a private business catering to the general public to discriminate against these defendants solely on the basis of race and color.

(2) That said statutes are being used as a basis of unconstitutional State action in that the State police power is provided to eject the defendants from a public place where he has been invited and has a legal right to go, and to arrest them and deprive them of their liberty solely on the basis of race and color.

(3) That said statute is being used as a basis of unconstitutional State action in depriving said defendants of their liberty in that they are singled out as being ejected and arrested solely on the basis of race and color, while others are allowed to remain where the defendants had the right to be.

[fol. 69] The defendants move for arrest of judgment or in the alternative for a new trial on the ground that for the State to stand idly by and allow a private individual in public business to discriminate against the defendants on the basis of race and color alone and then for the State to back up this discrimination by State action in ejecting, arresting and subjecting to trial these defendants is a denial of due process of law and a denial of the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution.

The defendants move for arrest of judgment or in the alternative a new trial for the reason that the evidence

shows that the said defendants were attempting to exercise their common law right to free access to the common market and that to be denied that right by the State by being ejected from the business places described in the record and subjected to arrest by the State solely on the basis of race and color is a denial of the equal protection of the laws and due process of law as guaranteed by the 14th Amendment of the United States Constitution and Article 1, Section 5 of the South Carolina Constitution.

IN THE RICHLAND COUNTY COURT, CRIMINAL DIVISION

OPINION—April 28, 1961

These Appeals from the Recorder's Court of The City of Columbia were orally argued together before me and taken under advisement. The facts are largely undisputed. All of the Defendants are Negroes. Eckerd's Drug Store and Taylor Street Pharmacy are separate stores in The City of Columbia. Besides filling prescriptions, each sells drugs and sundries and has a section where lunch, light snacks and soft drinks are served. Trade is with the general pub-
[fol. 70] lic in all the departments except the lunch department where only white people are served.

On one occasion, Bouie and Neal went into Eckerd's and on another day the other Defendants went into the Taylor Street Pharmacy, sat down in the lunch department and waited to be served. All said they intended to be arrested. In each case, the manager of the store came up to them with a peace officer and asked them to leave. They refused to do so and were then placed under arrest and charged with trespass and breach of the peace. Bouie, in addition, was charged with resisting arrest. It is undenied that he resisted.

Bouie and Neal were tried on March 25, 1960, and the other Defendants on March 30, 1960, before The Honorable John I. Rice, City Recorder of Columbia, without a jury; trial by jury having been waived by all the Defendants.

All the Defendants were convicted and sentenced and these appeals followed. Motions raising the constitutional questions were timely made.

There are 16 grounds of Appeal in the Bouie and Neal proceeding and 13 grounds of appeal in the proceeding involving the other Defendants, raising the following questions: (1) Did the State deny Defendants, who are Negroes, due process of law and equal protection of the laws within the Federal and State Constitutions either by using its peace officers to arrest them or by charging them with violating Secs. 16-386 (Criminal Trespass) and 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended, when they refused to leave a lunch counter when asked by the manager thereof to do so? (Bouie and Neal Nos. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15; and other Defendants, Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13.) (2) Was there any substantial evidence pointing to the guilt of the [fol. 71] Defendants? (Bouie and Neal, No. 8; other Defendants, No. 7.)

Since Defendants did not argue Bouie and Neal's Exceptions 7, 9 and 16, I have considered them abandoned.

The State has not denied Defendants equal protection of the laws or due process of law within the Federal or State Constitutional provisions.

A lunch room is like a restaurant and not like an inn.

The difference between a restaurant and an inn is explained in *Alpaugh v. Wolverton*, 36 S. E. (2d) 907 (Court of Appeals of Virginia) as follows:

> "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 A. Jr., Innkeepers, No. 120, p. 623; 43 C. J. S., Innkeepers, No. 29, subsection b, p. 1169. His responsibilities and rights are more like those of a shopkeeper. *Davidson* v. *Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N. W. 967, 969, L. R. A. 1919 E, 704. He is under no common-law duty to serve anyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. *Nance* v. *Mayflower Tavern-Inc.*, 106 Utah 517, 150 P. (2d) 773, 776; *Noble* v. *Higgins*, 95 Misc. 328, 158 N. Y. S. 867, 868."

And the proprietor can choose his customers on the basis of color without violating constitutional provisions. *State* v. *Clyburn*, 101 S. E. (2d) 295, 247 N. C. 455; *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack* v. *Atlantic Whitetower, etc.*, 181 F. Sup. 124 (Dist. Court Md.), 284 F. (2d) 746.

[fol. 72] In the *Williams* case, *supra*, Judge Soper, speaking for the Court of Appeals for The Fourth Circuit, said: "As an instrument of local commerce, the restaurant is not subject to the Constitution and statutory provisions above (Commerce Clause and Civil Rights Acts of 1875), and is at liberty to deal with such persons as it may select."

And in *Boynton* v. *Virginia*, . . . U. S. . . . , 81 S. Ct. 182, 5 L. Ed. (2d) 206, The Supreme Court of The United States took care to state:

> "Because of some of the arguments made here it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers."

I have reviewed all of the cases cited by both the City and the Defendants, and in addition have reviewed subsequent cases of the Court of Appeals and The United States Supreme Court, including the case of *Burton* v. *Wilmington Parking Authority*, handed down on April 17, 1961, and find none applicable or controlling except the *Williams* and *Slack* cases, *supra*.

The Defendants, under South Carolina law, had no right to remain in the stores after the manager asked them to leave. *Shramek* v. *Walker*, 149 S. E. 331, 152 S. C. 88. As the Court quoted the rule, "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, [fol. 73] on the request of the owner, will make him a tres-

passer, and justify the owner in using reasonable force to eject him."

If the manager could have ejected Defendants himself, he could call upon officers of the law to eject them for him.

Since the Defendants refused to leave, they were criminal trespassers under Sec. 15-909 of The Code of Laws of South Carolina, 1952, and their conviction was proper.

Shelly v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 845, 68 S. Ct. 836, 3 A. L. R. (2d) 441, and *Barrows* v. *Jackson*, 346 U. S. 249, 97 L. Ed. 1586, 73 Supreme Court 1031 cited by the Defendants are not in point. In both of these cases, there had been a sale of real estate to a non-caucasian in violation of restrictive covenants. In the *Shelley* case, the Court held that the equity of court of the State could not be used against the non-caucasian to enforce the covenant. In the *Barrows* case, the court held that the covenant could not be enforced by an action at law for damages against the co-covenanter, who broke the covenant.

In both of these cases, there were willing sellers and willing purchasers. The purchasers paid their money and entered into possession. Having entered, they had a right to remain.

In the cases before the Court, there were no two willing parties to a contract. True, the Defendants wanted to buy, but the storekeeper did not want to sell and the Defendants had no right to remain after being asked to leave. A white person would not have the right to remain after being asked to leave either. In either case, a person would be a trespasser. The Constitutions provide for equal rights, not paramount rights.

[fol. 74] I have only to pick up my current telephone directory and look in the yellow pages to find at least four establishments listed under "Restaurants" that advertise that they are for colored or for colored only.

To say that a white proprietor may not call upon a policeman to remove or arrest a Negro trespasser or a Negro proprietor cannot call upon a policeman to remove or arrest a White trespasser would lead to confusion, lawlessness and possible anarchy. Certainly, the Constitutions intended no such result.

The fundamental fallacy in the argument of Defendants is the classification of the stores and lunch counters as public places and the operations thereof as public carriers.

A person, whatever his color, enters a public place or carrier as a matter of right. The same person, whatever his color, enters a store or restaurant or lunch counter by invitation.

That person's right to remain in a public place depends upon the law of the land, and in a public carrier upon such law and such reasonable rules as the carrier may make, and, under the Constitution, neither the law nor rules may discriminate upon the basis of color.

On the other hand, the same person has no right to enter a store, a restaurant, or lunch counter unless and until invited, and may remain only so long as the invitation is extended. Whether he enters or remains depends solely upon the invitation of the storekeeper, who has a full choice in the matter. The operator can trade with whom he wills, or he can, at his own whim and pleasure, close up shop.

There is no question but that the Defendants are guilty. They were asked to leave and they refused. They, thereupon, were trespassers and such constituted a breach of [fol. 75] the peace. In addition, Bouie admittedly resisted a lawful arrest.

The trespass statute (Section 16-386,as amended, Code of Laws of South Carolina, 1952) is not restricted to "pasture or open hunting lands" as defendants argue. The statute specifically says "any other lands". In Webster's New International Dictionary, the definition of "land" in "Law" is as follows:

> "(a) any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by man, as buildings, fences, etc., extending indefinitely vertically upwards and downwards. (b) An interest or estate in land; loosely any tenement or hereditament."

The statute thus applies everywhere and without discrimination as to color. There is no question but that it was designed to keep peace and order in the community.

Since Defendants had notice that neither store would serve Negroes at their lunch counters, they were trespassers *ab initio*. Aside from this, however, the law is that even though a person enters property of another by invitation, he becomes a trespasser after he has been asked to leave. *Shramek* v. *Walker*, *supra*.

For the reasons herein stated, I am of the opinion that the judgments and sentences of the Recorder should be sustained and the Appeals dismissed, and it is so *Ordered*.

John W. Crews, Judge, Richland County Court.

Columbia, S. C., April 28, 1961.

[fol. 76]

IN THE RICHLAND COUNTY COURT, CRIMINAL DIVISION

NOTICE OF INTENTION TO APPEAL—May 2, 1961

To: Messrs. John W. Sholenberger and Edward A. Harter, Jr., Attorneys for the City of Columbia:

You will please take notice that the defendants above named intend to and do hereby appeal to the Supreme Court of South Carolina from the Order of the Richland County Court, Criminal Division, in the above entitled matter, dated April 28, 1961, upon a case and exceptions hereafter to be served upon you.

Jenkins and Perry, By: Lincoln C. Jenkins, Jr.,
Attorneys for Defendants.

Acceptance of service (omitted in printing).

IN THE RICHLAND COUNTY COURT, CRIMINAL DIVISION

EXCEPTIONS

1. The Court erred in refusing to hold that the City failed to prove a *prima facie* case.

2. The Court erred in refusing to hold that the City failed to establish the *corpus delicti*.

3. The Court erred in refusing to hold that the evidence shows conclusively that the arresting officers acted in the furtherance of a custom, practice and policy of discrimination based solely on race or color, and that the arrests and convictions of appellants under such circumstances are a denial of due process of law and the equal protection of the laws, secured to them by the Fourteenth Amendment to the United States Constitution.

[fol. 77] 4. The Court erred in refusing to hold that the evidence establishes merely that at the time of their arrests appellants were peaceably upon the premises of Eckerd's Drug Store as customers, visitors, business guests or invitees of a business establishment performing economic functions invested with the public interest, and that the procurement of the arrest of appellants by management of said establishment under such circumstances in furtherance of a custom, practice and policy of racial discrimination is a violation of rights secured appellants by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

IN THE RICHLAND COUNTY COURT, CRIMINAL DIVISION

STIPULATION

It is hereby stipulated and agreed by and between counsel for the appellants and respondent that the foregoing, when printed, shall constitute the Transcript of Record herein and that printed copies thereof may be filed with the Clerk

of the Supreme Court and shall constitute the Return herein.

Respectfully submitted,

John W. Sholenberger, Edward A. Harter, Jr., Columbia, South Carolina, Attorneys for Respondent.

Jenkins and Perry, Columbia, South Carolina, By: Lincoln C. Jenkins, Jr., Attorneys for Appellants.

[fol. 77a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 78]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4778

THE CITY OF COLUMBIA, Respondent,

v.

SIMON BOUIE and TALMADGE J. NEAL, Appellants.

Appeal From Richland County, John W. Crews, County Judge.

Affirmed in Part; Reversed in Part.

Jenkins & Perry, of Columbia, for appellants.

John W. Sholenberger and Edward A. Harter, Jr., both of Columbia, for respondent.

OPINION No. 17875—Filed February 13, 1962

Legge, A. J.: The appellants Simon Bouie and Talmadge J. Neal, Negro college students, were arrested on March

14, 1960, and charged with trespass (Code, 1952, Section 16-386 as amended) and breach of the peace (Code, 1952, Section 15-909). Bouie was also charged with resisting arrest. On March 25, 1960, they were tried before the Recorder of the City of Columbia, without a jury. Both were found guilty of trespass; Bouie guilty also of resisting arrest. Bouie was sentenced to pay a fine of one hundred ($100.00) dollars or to imprisonment for thirty (30) days on each charge, twenty-four and 50/100 ($24.50) of each fine being suspended and the prison sentences to run consecutively. Neal was sentenced to pay a fine of one hundred ($100.00) dollars, of which twenty-four and 50/100 ($24.50) was suspended, or to imprisonment for thirty (30) days. On appeal to the Richland County Court the judgment of the Recorder's Court was affirmed by order dated April 28, 1961, from which this appeal comes.

Eckerd's, one of Columbia's larger drugstores, in addition to selling to the general public drugs, cosmetics and other articles usually sold in drugstores, maintains a luncheonette department. Its policy is not to serve Negroes in that department.

On March 14, 1960, about noon, the appellants entered this drugstore and sat down in a booth in the luncheonette department for the purpose, according to their testimony, of ordering food and being served. Neal testified that it was his intention to be arrested; Bouie testified that he knew of the store's policy not to serve Negroes in that department, and that it was his purpose also to be arrested "if it took that". No employee of the store approached them, and they continued to sit in the booth for some fifteen minutes, each with an open book before him, when the manager of the store came up, in company with a police officer, told them that they would not be served, and twice requested them to leave. Upon their ignoring such request, the police officer asked them to leave, which request brought no result other than the query "for what" from Bouie. The police officer then told them to leave and that they were under arrest. Thereupon Neal closed his book and got up; Bouie did not, and the officer thereupon caught him by the arm and lifted him out of the seat. Bouie's book being still

on the table, he was permitted to get it; and the officer then seized him by the belt and proceeded to march him out of the store. Bouie testified that he made no resistance, but only said to the officer when the latter had hold of his belt, "That's all right, Sheriff, I'll come on". The officer testified that Bouie said: "Don't hold me, I'm not going anywhere", and that after they had proceeded a few steps he "started pushing back and said 'Take your hands off me, you don't have to hold me.'"

The appeal here is based upon four Exceptions of which Nos. 3 and 4 present, in substance, the contention that appellants' arrest by the police officer at the instance of the store manager, and the convictions of trespass that followed, were in furtherance of an unlawful policy of racial [fol. 79] discrimination and constituted state action in violation of appellants' rights under the Fourteenth Amendment. Identical contention was made, considered, and rejected in City of Greenville v. Peterson, filed November 10, 1961, —— S. C. ——, —— S. E. (2d) ——; City of Charleston v. Mitchell, filed December 13, 1961, —— S. C. ——, —— S. E. (2d) —— and City of Columbia v. Barr, filed December 14, 1961, —— S. C. ——, —— S. E. (2d) ——, in each of which was involved a sit-down demonstration, similar to that disclosed by the uncontradicted evidence here, at a lunch counter in a place of business privately owned and operated, as was Eckerd's in the case at bar. Exceptions 3 and 4 are overruled.

Exceptions 1 and 2 purport to question the sufficiency of the evidence to make out a case of trespass as to either appellant, or a case of resisting arrest as to the appellant Bouie. So far as they relate to the charge of trespass, these exceptions are without merit. The uncontradicted testimony, to which we have referred, amply supported that charge.

On the other hand, the evidence was in our opinion insufficient to warrant Bouie's conviction on the charge of resisting arrest. It is apparent from the testimony of the arresting officer that the only "resistance" on Bouie's part was his failure to obey immediately the officer's order, with the result that the latter "had to pick him up out of the

seat". Resisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it, State v. Hollman, 232 S. C. 489, 102 S. E. (2d) 873. But we do not think that such momentary delay in responding to the officer's command as is shown by the testimony here amounted to "resistance" within the intent of the law, City of Charleston v. Mitchell, supra.

The judgment is affirmed as to the conviction and sentence of each of the appellants on the charge of trespass; it is reversed as to the conviction and sentence of the appellant Bouie on the charge of resisting arrest.

Affirmed in part and reversed in part.

Taylor, C.J., Moss and Lewis, JJ., concur.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 80]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4778

CITY OF COLUMBIA, Respondent,

against

SIMON BOUIE and TALMADGE J. NEAL, Appellants.

PETITION FOR REHEARING—February 22, 1962

To the Honorable Chief Justice and Associate Justice of the Supreme Court of South Carolina:

Petitioners, Simon Bouie and Talmadge J. Neal, respectfully request a rehearing in the above-entitled case. Petitioners submit that this Court, in affirming that part of the judgment of the Court below which sustained petitioners' conviction of the offense of trespass under Section

16-386, Code of Laws of South Carolina for 1952, may have overlooked or misapprehended certain facts and rules of law, urged by petitioners in their appeal.

1. The Court may have misapprehended that Section 16-386, Code of Laws of South Carolina for 1952, was invoked against petitioners in this case solely for the purpose of preserving and furthering the custom of excluding Negroes from lunch counters in Columbia, South Carolina [fol. 81] or segregating them in same, in violation of petitioners' rights to due process of law and equal protection of the laws, protected by the Fourteenth Amendment to the United States Constitution.

2. The Court may have overlooked petitioners' assertion that they were unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment. The Court further overlooked the applicability of *Marsh* v. *Alabama*, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276, and *Munn* v. *Illinois*, 94 U.S. 113, 26 L.Ed. 77, to this argument.

3. The Court may have overlooked petitioners' assertion that in arresting and prosecuting petitioners, the State has either enforced or supported racial segregation in a place open to the general public, thereby infringing their rights under the Fourteenth Amendment to the United States Constitution. Petitioners, in their appeal, did not challenge the right of the store manager to select his customers, but asserted that the State cannot implement and enforce segregation by direct action on the part of its police nor by statutory scheme.

Conclusion

Wherefore, petitioners request they be granted a rehearing in this case.

Jenkins and Perry, Columbia, South Carolina, By: Matthew J. Perry, Attorneys for Appellants.

Columbia, South Carolina, February 22, 1962.

[fol. 82]

Certificate

I, Harold R. Boulware, hereby certify that I am a practicing attorney of this Court and am in no way connected with the within case. I further certify that I am familiar with the record of this case and have read the opinion of this Court which was filed February 13, 1962, and in my opinion there is merit in the Petition for Rehearing.

Harold R. Boulware

Columbia, South Carolina, February 22, 1962.

[fol. 83]

Order Denying Petition for Rehearing—March 7, 1962

The Within Petition for Rehearing has been carefully considered and is found to be without merit. The Petition is therefore denied.

C. A. Taylor, C.J., Lionel K. Legge, A.J., Joseph R. Moss, A.J., J. Woodrow Lewis, A.J.

[fol. 84]

In the Supreme Court of the State of South Carolina

Case No. 4778

[Title omitted]

Petition for Stay of Remittitur

To the Honorable Claude A. Taylor, Chief Justice of the Supreme Court of South Carolina:

The Petition of Simon Bouie and Talmadge J. Neal, respectfully shows:

[fol. 85] 1.

Petitioners have been convicted of the offense of trespass after notice under Section 16-386, Code of Laws of

South Carolina for 1952. Their convictions of this offense have been affirmed by the Supreme Court of South Carolina in an opinion which was filed on February 13, 1962. In the same opinion, petitioner, Simon Bouie's conviction of the offense of resisting arrest was reversed.

2.

Thereafter, petitioners requested rehearing of said cause in a Petition therefor dated February 22, 1962. Rehearing was denied on March 7, 1962.

3.

Petitioners are aggrieved with that portion of the decision which affirmed their convictions under Section 16-386, Code of Laws of South Carolina for 1952 and intend to petition the Supreme Court of the United States for a Writ of Certiorari in order that that Court can pass upon petitioners' contention that their arrests and convictions were in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the United States Constitution.

4.

Under the Rules of the United States Supreme Court, petitioners have ninety (90) days after the rendering of the final judgment of this court within which to file their Petition for Writ of Certiorari. Petitioners are therefore desirous of obtaining a stay of the sentences imposed upon them and a Stay of the Remittitur herein for a period of ninety (90) days after the rendering of the final judgment of this Court in order that they may have time within which to file said Petition for Writ of Certiorari.

5.

Counsel for the City of Columbia have agreed to a proposed Order, Staying the Remittitur for the requested period.

[fol. 86] Wherefore, petitioners pray that execution of their sentences be stayed and that Remittitur in this matter be stayed by order to this Honorable Court for a period of Ninety (90) days after the final judgment of said Court in order that they may file in the United States Supreme Court a Petition for Writ of Certiorari.

Jenkins and Perry, Columbia, South Carolina, By: Matthew J. Perry, Attorneys for Appellants.

[fol. 87]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4778

CITY OF COLUMBIA, Respondent,

against

SIMON BOUIE and TALMADGE J. NEAL, Appellants.

ORDER STAYING REMITTITUR

On the 13th day of February, 1962, we issued an Opinion in the above case, Reversing in part and Affirming in part the judgment of the County Court for Richland County. Specifically, we affirmed that portion of the judgment which sustained appellants' conviction of the offense of trespass after notice under Section 16-386, Code of Laws of South Carolina for 1952.

Thereafter, appellants petitioned this Court for a rehearing and, on March 7, 1962, we entered an Order, denying same.

Appellants have now indicated that they desire and intend to file in the Supreme Court of the United States a Petition for Writ of Certiorari, seeking review of our judgment in said cause. Under the rules and decisions of the United States Supreme Court, they have ninety (90) days after the final judgment of this Court within which to

file their Petition for Writ of Certiorari. The final judgment of this Court is the Order, denying rehearing. *Department of Banking, State of Nebraska* v. *Pink*, 65 S. Ct. 253, 317 U. S. 264, 87 L. Ed. 254. They desire a Stay of the Remittitur and Sentences in this matter pending the [fol. 88] filing of their Petition for Writ of Certiorari in the United States Supreme Court and thereafter until said matter has been disposed of by that Court. It appears that the request for Stay of Remittitur and Sentences is proper. Now, on motion of counsel for the appellants, by and with the consent of counsel for the respondent,

It Is Ordered that the Remittitur and execution of the sentences herein be stayed for a period of ninety (90) days after the day of the final judgment of this Court in order that petitioners may file with the United States Supreme Court their Petition for Writ of Certiorari.

It Is Further Ordered that if a notice from the Clerk of the United States Supreme Court that the Petition for Writ of Certiorari has been filed in that Court is filed with the Clerk of the Supreme Court of South Carolina within the time aforesaid, the Stay of Remittitur and execution of Sentences herein shall continue in effect until final disposition of the case by the Supreme Court of the United States.

Claude A. Taylor, Chief Justice.

We Consent: John W. Sholenberger, Edward A. Harter, Jr., Attorneys for Respondent.

[fol. 89] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 90]

SUPREME COURT OF THE UNITED STATES

No. 159—October Term, 1962

SIMON BOUIE and TALMADGE J. NEAL, Petitioners,

vs.

CITY OF COLUMBIA.

ORDER ALLOWING CERTIORARI—June 10, 1963

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] # 10 1963

SIMON BOUIE and TALMADGE J. NEAL,

Petitioners,

—v.—

CITY OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
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Columbia, South Carolina

Attorneys for Petitioners

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IN THE

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No. .....

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Petitioners,

—v.—

CITY OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on February 13, 1962, rehearing of which was denied on March 7, 1962.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina is unreported as of yet and is set forth in the appendix hereto, *infra*, pp. 10a-13a. The opinion of the Richland County Court is unreported and is set forth in the appendix hereto, *infra*, pp. 3a-9a. The opinion of the Recorder's Court of the City of Columbia is unreported and is set forth in the appendix hereto, *infra*, pp. 1a-2a.

Jurisdiction

The Judgment of the Supreme Court of South Carolina was entered February 13, 1962, *infra*, pp. 10a-13a. Petition for Rehearing was denied by the Supreme Court of South Carolina on March 7, 1962, *infra*, p. 14a.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257(3), petitioners having asserted below and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Whether the due process and equal protection clauses of the Fourteenth Amendment permit a state to use its executive and judiciary to enforce racial discrimination in conformity with a state custom of discrimination by arresting and convicting petitioners of criminal trespass on the premises of a business which has for profit opened its property to the general public.

2. Whether petitioners' conviction of trespass at the restaurant of a variety store offends the due process clause of the Fourteenth Amendment when petitioners were convicted for engaging in a sit-in protest demonstration and the criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited, and their conduct violated no standard required by the plain language of the law or any earlier interpretation thereof.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 16-386, Code of Laws of South Carolina for 1952, as amended, which states:

> Entry on lands of another after notice prohibiting same
>
> Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing.

Statement

At approximately 11:00 A.M. on March 14, 1960, petitioners, two Negro college students entered the Eckerd's Variety Store in Columbia, South Carolina (R. 36, 49). They seated themselves at a booth in the food department and sought service (R. 7, 31, 33, 35, 49, 52). Both testified they had money with which to purchase food (R. 8, 16, 38, 48, 51, 55). No one spoke to the petitioners or approached them to take their order for food (R. 31, 32, 38). After petitioners were seated an employee of the store

put up a chain with a "No Trespassing" sign (R. 35). Petitioners testified that white persons were seated in the food department and were being served food at this time (R. 36, 37, 53, 54). They continued to sit in the booth for some fifteen or twenty minutes (R. 30, 49). While waiting service, petitioners sat each with an open book before him (R. 3, 16, 38, 51).

The manager of Eckerd's called the Columbia police (R. 32) who arrived and proceeded with the manager directly to the booth where petitioners were seated (R. 3, 6). The manager told petitioners to leave " . . . because we aren't going to serve you" (R. 3, 12). Petitioners remained seated and the Chief of Police then asked petitioners to leave (R. 3, 50). When petitioners did not comply the Chief of Police placed them under arrest (R. 3, 13). Bouie asked the Chief of Police "for what" (R. 4, 5, 12). The Chief then "reached and got him by the arm . . . and . . . had to pull him out of the seat" (R. 4). The Chief then seized him by the belt, gave him a "preliminary frisk," and marched him out of the store (R. 4, 17, 51). Bouie testified that he offered no resistance and told the Chief "That's all right, Sheriff, I'll come on" (R. 51).

The Chief was asked on cross examination: Q. "Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons, was because they were Negroes who were asking for srvice (sic) in the food department in Eckerd's drug store, and the manager was directing them out because they were Negroes? Isn't that correct?" A. "Why certainly, I would think that would be the case" (R. 20, 21).

Eckerd's, one of Columbia's larger variety stores is part of a regional chain with numerous stores located throughout the South (R. 19, 29). In addition to the food depart-

ment, Eckerd's maintains other departments including retail drug, cosmetic and prescriptions (R. 20, 29). Negroes and whites are invited to purchase and are served alike in all departments of the store with the single exception that Negroes "have never been" served in the food department which is reserved for whites (R. 29, 30, 52). Negroes are not served in the food department because as the store manager put it, " . . . all the stores do the same thing" (R. 31). There was, however, no evidence that any signs or notices are present in the store indicating that Negroes are not served at the lunch counter.

Throughout the events that led to their arrest, petitioners were completely orderly and peaceful (R. 9, 35).

Petitioners were charged with trespass in violation of Section 16-386 as amended of the Code of Laws of South Carolina, *infra*, p. 10a. Section 16-386 states:

> Entry on lands of another after notice prohibiting same.
>
> "Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purposes of trespassing."

Petitioners were also charged with breach of the peace in violation of Section 15-909, Code of Laws of South Caro-

lina, 1952, *infra*, p. 10a. Petitioner Bouie was also charged with the common law crime of resisting arrest, *infra*, p. 10a.

Petitioners were tried in the Recorder's Court of the City of Columbia without a jury and convicted of trespass in violation of Section 16-386 and sentenced to pay fines of $100.00 or serve thirty days in jail, $24.50 of the fines being suspended. Petitioner Bouie was convicted of resisting arrest and fined $100.00 or thirty days, $24.50 of the fine being suspended. Bouie's sentences were to run consecutively (R. 62, 63).

Petitioners appealed to the Richland County Court which sustained the judgments and sentences of the Recorder's Court of the City of Columbia on April 28, 1961, *infra*, pp. 3a-9a.

Petitioners thereupon appealed to the Supreme Court of South Carolina which affirmed the judgment of conviction of trespass in violation of Title 16, Section 386 of the 1952 Code of Laws of South Carolina, as amended, and reversed the judgment of conviction against petitioner Bouie for resisting arrest on February 13, 1962, *infra*, pp. 10a-13a. The Supreme Court of South Carolina denied rehearing on March 7, 1962, *infra*, p. 14a.

How the Federal Questions Were Raised and Decided Below

At the close of the Prosecution's case in the Recorder's Court of the City of Columbia, petitioners moved to dismiss the charges against them on the grounds, *inter alia*, that (R. 25, 26, 65-66):

> "... for the State to stand idly by and allow a private individual in public business to discriminate against the defendants on the basis of race and color alone

and then for the State to back up this discrimination by State action in ejecting, arresting and subjecting to trial these defendants is a denial of due process of law and a denial of the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution.

The defendants move to dismiss the charges of trespass and breach of the peace, in violation of State Statutes Section 16-386 and 15-909, on the ground that evidence proves that the defendants were merely attempting to exercise their rights as business invitees of a business catering to the general public to exercise the freedom of being served by said business on a non-discriminating basis without regard to race and color and in so doing were not guilty of any crime.

Further, the defendants move to dismiss all charges against them on the ground that to deprive them of their liberty to enter such a business establishment as the record describes and be served as others, and that to be ejected and arrested by agents of the State —the police—solely on the basis of race and color, and to be singled out as the only persons ejected while others remain, is a denial of due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution."

The motion was overruled by the trial Court (R. 26).

Petitioners moved to dismiss the charges against them on the same grounds at the close of trial (R. 60, 63-66). This motion was denied by the trial Court (R. 60, 61-63).

Subsequent to judgment of conviction in the trial Court petitioners moved for arrest of judgment or in the alternative a new trial on the ground that:

> " . . . State Code No. 16-386, as amended, trespass and State Code No. 15-909, breach of peace, though constitutional on their faces, are as to these defendants, unconstitutionally applied, thus denying to these defendants due process of law and equal protection of the laws, in violation of the 14th Amendment of the United States Constitution . . . " (R. 68).

The motion for arrest of judgment or in the alternative for a new trial was supported by the same grounds as petitioners' motions to dismiss (R. 68-69). This motion was denied by the trial Court (R. 61).

Petitioners appealed to the Richland County Court renewing the constitutional objections to their convictions relied upon in the trial Court. The Richland County Court held that the proprietor of a restaurant can choose his customers on the basis of color without violating constitutional provisions and that in aiding his policy of exclusion the State of South Carolina was not enforcing racial discrimination (R. 71, 74). The Court also held:

> The Defendants, under South Carolina law, had no right to remain in the stores after the manager asked them to leave. *Shramek* v. *Walker*, 149 S. E. 331, 152 S. C. 88. As the Court quoted the rule, "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser, and justify the owner in using reasonable force to eject him" (R. 72-73).

Petitioners appealed to the Supreme Court of South Carolina claiming error in that the Court below refused (R. 76, 77):

"... to hold that the evidence shows conclusively that the arresting officers acted in the furtherance of a custom, practice and policy of discrimination based solely on race or color, and that the arrests and convictions of appellants under such circumstances are a denial of due process of law and the equal protection of the laws, secured to them by the Fourteenth Amendment to the United States Constitution.

4. The Court erred in refusing to hold that the evidence establishes merely that at the time of their arrests appellants were peaceably upon the premises of Eckerd's drug store as customers, visitors, business guests or invitees of a business establishment performing economic functions invested with the public interest, and that the procurement of the arrest of appellants by management of said establishment under such circumstances in furtherance of a custom, practice and policy of racial discrimination is a violation of rights secured appellants by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution."

The Supreme Court of South Carolina affirmed petitioners' conviction of trespass in violation of Title 16-Section 386, as amended, of the 1952 Code of Laws of South Carolina, holding that appellants' contention that "arrest by the police officer at the instance of the store manager, and the convictions of trespass that followed, were in furtherance of an unlawful policy of racial discrimination and constituted state action in violation of appellants' right under the Fourteenth Amendment" had been made, considered and rejected previously by the Court. The cases relied upon by the Supreme Court of South Carolina were *City of Greenville* v. *Peterson*, —— S. C. ——, 122 S. E. (2d) 826 (Petition for Writ of Certiorari

No. 750 filed 30 U. S. L. Week 3274); *City of Charleston* v. *Mitchell*, —— S. C. ——, 123 S. E. (2d) 512 (Petition for Writ of Certiorari No. 846 filed 30 U. S. L. Week 3324); *City of Columbia* v. *Barr*, —— S. C. ——, 123 S. E. (2d) 521 (Petition for Writ of Certiorari No. 847 filed 30 U. S. L. Week 3324).

The Supreme Court of South Carolina reversed petitioner Bouie's conviction for resisting arrest on the ground that the "momentary delay" of petitioner in responding to the officer's command did not amount to "resistance."

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Prior Decisions of This Court Which Condemn the Use of State Power to Enforce Racial Segregation.

Petitioners were not served in Eckerd's because they were Negroes and the custom of the City of Columbia is that Negroes may not be served at restaurants which also cater to whites (R. 31). See Petition for Writ of Certiorari in *City of Columbia* v. *Barr, et al.*, No. 847 filed in this Court 30 U. S. L. Week 3324. As the store manager put it "all stores do the same thing" (R. 31). It is also apparent that the arrests were made to support this discrimination. On cross examination the arresting officer was asked:

> Q. "Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons was because they were Negroes who were asking for srvice (sic) in the food department in Eckerd's drug store, and the manager was directing them out because they were Negroes? Isn't that cor-

rect?" A. "Why certainly, I would think that would be the case" (R. 20, 21).

The trial court convicted petitioners on evidence plainly indicating that race and race alone was the reason they were ordered to leave the restaurant.

The Supreme Court of South Carolina recognized the issue in this case to be whether police and judicial enforcement of Eckerd's racial discrimination policy violated the equal protection clause of the Fourteenth Amendment.

> ". . . the contention [is] that appellants' arrest by the police officer at the instance of the store manager, and the convictions of trespass that followed, were in furtherance of an unlawful policy of racial discrimination and constituted state action in violation of appellants' rights under the Fourteenth Amendment" (*infra*, p. 12a).

It answered this question contrary to petitioners' position by relying upon cases, involving similar issues, which are now pending before this Court, e.g. *Columbia* v. *Barr*, —— S. C. ——, 123 S. E. 2d 521, No. 847 October Term, 1961; *City of Greenville* v. *Peterson*, —— S. C. ——, 122 S. E. 2d 826 (No. 750, October Term, 1961); *Charleston* v. *Mitchell*, —— S. C. ——, 123 S. E. 2d 512 (No. 846 October Term, 1961).

But the decision is contrary to a growing body of principles declared by this Court. Where there is state action by the police, *Screws* v. *United States*, 325 U. S. 91; *Monroe* v. *Pape*, 365 U. S. 167; prosecutors, *Napue* v. *Illinois*, 360 U. S. 264, and judiciary, *Shelly* v. *Kraemer*, 334 U. S. 1, 14-18; *Boynton* v. *Virginia*, 364 U. S. 454, racial discrimination supported by state authority violates the Fourteenth Amendment. *Civil Rights Cases*, 109 U. S. 3, 17.

It is asserted, however, that the state is not enforcing racial discrimination, but is implementing a property right. But to the extent that management was asserting a "property" right to enforce racial segregation according to the custom of the City of Columbia, it becomes pertinent to inquire just what that property right is. See Henkin, "*Shelley v. Kraemer*: Notes for a Revised Opinion," 110 U. of Penn. L. Rev. 473, 494-505.

The mere fact that "property" is involved does not settle the matter, *Shelly* v. *Kraemer*, 334 U. S. 1, 22. "Dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley*, 245 U. S. 60, 74; *United States* v. *Willow River Power Co.*, 324 U. S. 499, 510; *Marsh* v. *Alabama*, 326 U. S. 501, 506; cf. *Munn* v. *Illinois*, 94 U. S. 113; *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 796, 802; *Goldblatt* v. *Town of Hempstead*, 30 U. S. L. Week 4343.

Eckerd's is a commercial variety store open to the public generally for the transaction of business, including the sale of food and beverages in its restaurant. It does not seek to keep everyone, or Negroes, or these petitioners from coming upon the premises. The white public is invited to use all the facilities of the store and Negroes are invited to use all these facilities except the restaurant. The management does not seek to exclude petitioners because of an arbitrary caprice, but rather, follows the community custom of Columbia which is, in turn, supported and nourished by law.

The portion of the store from which petitioners are excluded is not set aside for private or non-public use as an office reserved for the management or lounge or private restroom for employees. Petitioners did not seek to use the restaurant for any function inappropriate to its normal use. They merely sought food service. Therefore, it appears that the property interest which the State protects

here, by arrest, prosecution, and criminal conviction, is the claimed right to open the premises to the public generally, including Negroes, for business purposes, including the sale of food and beverages, while racially discriminating against Negroes, as such, at one integral part of the facilities. While this may, indeed, be a property interest, the question before this Court is whether the State may enforce it without violating the Fourteenth Amendment. This property interest certainly may be taken away by the State without violating the Fourteenth Amendment. *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359; *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88; *Pickett* v. *Kuchan*, 323 Ill. 138, 153 N. E. 667, 49 A. L. R. 499 (1926); *People* v. *King*, 110 N. Y. 419, 18 N. E. 245 (1888); Annotation 49 A. L. R. 505; cf. *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100; Henkin, *supra* at p. 499 n. 52.

Many states make it a crime to engage in the racially discriminatory use of private property which South Carolina enforces here. For the latest collection of such statutes, see Konvitz, *A Century of Civil Rights* (1961), *passim*. Indeed, Eckerd's has sought to achieve in this case something which the State itself could not permit it to do on state property leased to it for business use. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, or require or authorize it to do by positive legislation. See Mr. Justice Stewart's concurring opinion in *Burton*, *supra*. Although it does not necessarily follow from the fact that some states constitutionally may make racial discrimination on private property criminal, that other states may not enforce racial discrimination, it does become evident that Eckerd's property interest is hardly inalienable or absolute.

Basic to the disposition of this case is that Eckerd's is a public establishment open to serve the public as a part of the public life in the community. See *Garner* v. *Louisiana*,

368 U. S. 157, 176, Mr. Justice Douglas concurring. The case involves no genuine claim that Eckerd's right to "private" use of its property was interfered with by petitioners. To uphold petitioners' claims here affects only slightly the entire range of what are called private property rights. For if Eckerd's is disabled by the Fourteenth Amendment from enforcing by state action racial bias at its public lunch counter, homeowners are hardly disabled from enforcing their private rights even to implement racial prejudices. See Henkin, *supra* at pp. 498-500. There is a constitutional right of privacy protected by the due process clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 1080, 1103, 1104; see also *Poe* v. *Ullman*, 367 U. S. 497, 6 L. ed. 2d 989, 1006, 1022-1026 (dissenting opinions). This Court has recognized the relationship between right of privacy and property interests. *Thornhill* v. *Alabama*, 310 U. S. 88, 105-106; *Breard* v. *Alexandria*, 341 U. S. 622, 626, 638, 644. Only a very absolutist view of the property right to determine who may come or stay on one's property on racial grounds would require that a unitary principle apply to the whole range of property uses, public connections, dedications, and privacy interests which may be at stake. Petitioners certainly do not contend that the principles urged to prevent the use of trespass laws to enforce racial discrimination in a restaurant operated for profit as a public business would prevent the state from enforcing a similar bias in a private home or office where the right of privacy has its greatest meaning and strength.[1] As Mr. Justice Holmes stated in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355:

[1] The right of privacy cannot be destroyed by resort to the niceties of property law. *Chapman* v. *United States*, 365 U. S. 610, 617. "Rights of liberty and property, of privacy and voluntary association, must be balanced, in close cases, against the right not to have the state enforce discrimination . . . ." Henkin, "Shelley v. Kraemer: Notes for a Revised Opinion," 110 U. of Penn. L. Rev. 473, 496, 490-505.

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Where a right of private property is asserted by a proprietor so narrowly as to claim state intervention only in barring Negroes from a single portion of a public establishment, and that restricted assertion of right collides with the great immunities of the Fourteenth Amendment, petitioners respectfully submit that the propery right is no right at all.

Moreover, the assertion of racial prejudice here is not "private" at all. The segregation here enforced is that demanded by custom of the City of Columbia. While "custom" is referred to in the *Civil Rights Cases* as one of the forms of state authority within the prohibitions of the Fourteenth Amendment, 109 U. S. 3, 17 (see also Mr. Justice Douglas concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 179, 181), Columbia's custom exists in a context of massive state support of racial segregation.[2]

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[2] See S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing S. C. Const. Art. 11, §5 (1895) (which required legislature to maintain free public schools). S. C. Code §§21-761 to 779 (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-2 (appropriations cut off to any school from which any pupil transferred because of court order; §21-230(7) (local trustees may or may not operate schools); §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); S. C. Code §40-452 (1952) (unlawful for cotton textile manufacturer to permit different races to work together in same room, use same exits, bathrooms, etc., $100 penalty and/or imprisonment at hard labor up to 30 days; S. C. A. & J. R. 1956

Consequently, we have here state-nurtured and state-enforced racial segregation in a public institution concerning which no property right may be asserted in the face of the Fourteenth Amendment's prohibition of state enforced racial segregation. This state enforced segregation conflicts with Fourteenth Amendment principles which have been consistently asserted by this Court.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

Petitioners were engaged in the exercise of free expression by means of nonverbal requests for nondiscriminatory food service which were implicit in their continued remaining in the food department when refused service. The fact that sit-in demonstrations are a form of protest and expression was observed in Mr. Justice Harlan's concurrence in *Garner* v. *Louisiana, supra.* Petitioners' expression (seeking service) was entirely appropriate to the time and place at which it occurred. Petitioners did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There

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No. 917 (closing park involved in desegregation suit); S. C. Code §§51-1, 2.1-2.4 (1957) (Supp.) (providing for separate State Parks); §51-181 (separate recreational facilities in cities with population in excess of 60,000); §5-19 (separate entrances at circus); S. C. Code Ann. Tit. 38, §§714-720 (1952) (segregation in travel facilities). On April 5, 1962, the City of Greenville, South Carolina arrested and charged a Negro with the crime of violating "Sec. 31.10. The Code of City of Greenville S. C. 1953. Be Unlawful for Colored person to occupy Residence in White Block" (arrest and trial warrant No. 179, *City* v. *Robinson*). Cf. *Buchanan* v. *Warley*, 245 U. S. 60.

were no speeches, picket signs, handbills or other forms of expression in the store which were possibly inappropriate to the time and place. Rather, petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting), and was within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 633-624 (flag salute); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Petitioners do not urge that there is a Fourteenth Amendment right to free expression on private property in all cases or circumstances without regard to the owner's privacy, and his use and arrangement of his property. This is obviously not the law. In *Breard* v. *Alexandria*, 341 U. S. 622 the Court balanced the "householder's desire for privacy and the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests were involved with a corresponding difference in result.

The character of petitioners' right to free expression is not defined merely by reference to the fact that private property rights are involved. The nature of the property rights asserted and of the state's participation through its officers, its customs, and its creation of the property interest, have all been discussed above in connection with the state action issue as it related to racial discrimination. Similar considerations should aid in resolving the free expression question.

In *Garner* v. *Louisiana*, Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. It is submitted that even absent the owner's consent for petitioners to remain on the premises of this business establishment, a determination of their free expression rights requires consideration of the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action is supporting. *Marsh* v. *Alabama*, 326 U. S. 501.

In *Marsh, supra*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize for their faith, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); and compare the cases mentioned above with *N. L. R. B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 83 N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by this trespass prosecution, is support of the property owner's discrimination in conformity to the State's segregation custom and policy. This is all that the property owner has sought.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 52. The only "substantive evil" sought to be prevented by this trespass prosecution is the elimination of racial discrimination and the stifling of protest against it; but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination.

The fact that the arrest and conviction were designed to short circuit a bona fide protest is strengthened by the necessity of the state court to make a strained and novel interpretation of the statute in order to bring petitioners' conduct within its ambit. Petitioners' conviction for trespass rests on an interpretation which flies in the face of the plain words of the statute, all prior applications, and ignores the most recent legislative amendment to said statute. The trespass statute prior to amendment read:

> Every entry upon the lands of another after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon and shall publish once a week for four consecutive

> weeks such notice in any newspaper circulating in the county in which such lands are situated, a proof of the posting and of publishing of such notice within twelve months prior to entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of hunting or fishing on such land. (Code of Laws, South Carolina, 1952.)

The amended statute under which petitioners' convictions were had added the language which is italicized:

> Every entry upon the lands of another *where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another* . . .

The Legislature obviously limited the statute to trespass on land primarily used for farm purposes. Petitioners have been able to find no cases under the instant criminal statute or its predecessors in which the trespass punished was not for entry on land (generally farm land) or some adjunctive land such as on the road.[3] See *State* v. *Green*, 35 S. C. 266; *State* v. *Mays*, 24 S. C. 190; *State* v. *Tenney*, 58 S. C. 215; *State* v. *Hallback*, 40 S. C. 298; *State* v. *Gray*, 76 S. C. 83 (all cases of trespass on land or specifically farm land). The amendment was merely declaratory, making explicit on the face of the statute the prior applications. The action of the court below in extending the statute to business premises, is, therefore, completely novel and unsupported by prior cases or the recent amendment.

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[3] The only exceptions being sit-in convictions presently pending before this Court, *Columbia* v. *Barr et al.*, 123 S. E. 2d 521 (1961) (Petition for Certiorari No. 847 filed 30 U. S. L. Week 3324); *Charleston* v. *Mitchell, et al.*, 123 S. E. 2d 512 (1961) (Petition for Certiorari No. 846 filed 30 U. S. L. Week 3324), which were decided subsequent to the events which led to petitioners' arrest and conviction.

Further, the statute in terms prohibits only going on the land of another *after* being forbidden to do so. The Supreme Court of South Carolina has now construed the statute to prohibit also remaining on property when directed to leave the following lawful entry. In short, the statute is now applied as if "remain" were substituted for "enter." There is no history to support this second novel construction of the statute. No South Carolina case has ever adopted such a construction.[4] See Note 3, *supra* p. 20.

Subsequent to petitioners' conviction the legislature of the State of South Carolina enacted into law Section 16-388 a trespass statute making criminal failing and refusing "to leave immediately upon being ordered or requested to do so" the premises or place of business of another. See Petition for Writ of Certiorari in *Peterson, et al.* v. *City of Greenville*, No. 750 filed in this Court, 30 U. S. L. Week 3276.

There is no question but that petitioners and all Negroes were welcome in Eckerd's—apart from the restaurant (R. 29). The restaurant is an integral part of the store and can only be reached by "entry" into the store proper—to which petitioners were admittedly invited (R. 29). Absent the special expansive interpretation given Section 16-386 by the Supreme Court of South Carolina, the case would plainly fall within the prineiple of *Thompson* v. *City of Louisville*, 362 U. S. 199, and would be a denial of due

[4] As authority for this construction the South Carolina Courts cite *Shramek* v. *Walker*, 152 S. C. 88, 149 S. E. 331, which was a civil suit for trespass. But civil and criminal trespass have long been distinguished, the latter requiring, at common law, special circumstances such as breach of the peace. *Rex* v. *Storr*, 3 Burr. 1698. *Cf.* American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comment.

process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered the premises "after notice . . . prohibiting such entry" and the conclusion that they did rests solely upon the special construction of the law.

Under familiar principles the construction given a state's statute by its highest court determines its meaning. Petitioners submit; however, that this statute has been judicially expanded to the extent that it does not give a fair and effective warning of the acts it now prohibits. Because of the expansive construction, the statute now reaches more than its words fairly and effectively define, and therefore, as applied it offends the principle that criminal laws must give fair and effective notice of the acts they prohibit.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently explicit to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids", *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, and cases cited therein in note 2.

Construing and applying federal statutes this Court has long adhered to the principle expressed in *Pierce* v. *United States*, 314 U. S. 206, 311:

> . . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451, and cases cited.

In *Pierce, supra*, the Court held a statute forbidding false personation of an officer or employee of the United States inapplicable to one who had impersonated an officer of the

T. V. A. Similarly in *United States* v. *Cardiff*, 344 U. S. 174, this Court held too vague for judicial enforcement a criminal provision of the Federal Food, Drug, and Cosmetic Act which made criminal a refusal to permit entry of inspection of business premises "as authorized by" another provision which, in turn, authorized certain officers to enter and inspect "after first making request and obtaining permission of the owner." The Court said in *Cardiff*, at 344 U. S. 174, 176-177,

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon* v. *Lowry*, 301 U. S. 242.

The Court applied similar principles in *McBoyle* v. *United States*, 283 U. S. 25, 27; *United States* v. *Weitzel*, 246 U. S. 533, 543, and *United States* v. *Wiltberger*, 18 U. S. (5 Wheat.) 76, 96. Through these cases run a uniform application of the rule expresed by Chief Justice Marshall:

> It would be dangerous, indeed; to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated (*id.* 18 U. S. (5 Wheat.) at 96).

The cases discussed above involved federal statutes concerning which this Court applied a rule of construction

closely akin to the constitutionally required rule of fair and effective notice. This close relationship is indicated by the references to cases decided on constitutional grounds. The *Pierce* opinion cited for comparison *Lanzetta* v. *New Jersey, supra*, and "cases cited therein," while *Cardiff* mentions *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 and *Herndon* v. *Lowry*, 301 U. S. 242.

On its face the South Carolina trespass statute warns against a single act, i.e., entry upon the land of another "after" notice prohibiting such. "After" connotes a sequence of events which by definition excludes going on or entering property "before" being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission and later failing to leave when directed.

Petitioners do not contend for an unreasonable degree of specificity in legislative drafting. Some state trespass laws have recognized as distinct prohibited acts the act of going upon property after being forbidden and the act of remaining when directed to leave.[5] South Carolina passed a statute punishing those who remain after being directed

[5] See for example the following state statutes which do effectively differentiate between "entry" after being forbidden and "remaining" after being forbidden. The wordings of the statutes vary but all of them effectively distinguish the situation where a person has gone on property after being forbidden to do so, and the situation where a person is already on property and refuses to depart after being directed to do so, and provide separately for both situations: Code of Ala., Title 14, §426; Compiled Laws of Alaska Ann. 1958, Cum. Supp. Vol. III, §65-5-112; Arkansas Code, §71,1803; Gen. Stat. of Conn. (1958 Rev.), §53-103; D. C. Code §22-3102 (Supp. VII, 1956); Florida Code, §821.01; Rev. Code of Hawaii, §312-1; Illinois Code, §38-565; Indiana Code, §10-4506; Mass. Code Ann. C. 266, §120; Michigan Statutes Ann. 1954, Vol. 25, §28.820(1); Minnesota Statutes Ann. 1947, Vol. 40, §621.57; Mississippi Code, §2411; Nevada Code, §207.200; Ohio Code, §2909.21; Oregon Code, §164.460; Code of Virginia, 1960 Replacement Volume, §18.1-173; Wyoming Code, §6-226.

to leave two months after petitioners' conviction, Section 16-388, Code of Laws of South Carolina. See *supra*, p. 21. Converting, by judicial construction, the common English word "entry" into a word of art meaning "remain" or "trespass" has transformed the statute from one which fairly warns against one act into a law which fails to apprise those subject to it "in language that the common world will understand, of what the law intends to do if a certain line is passed" (*McBoyle* v. *United States*, 283 U. S. 27). Nor does common law usage of the word "entry" support the proposition that it is synonymous with "trespass" or "remaining." While "entry" in the sense of going on and taking possession of land is familiar (Ballentine, "Law Dictionary" (2d Ed. 1948), 436; "Black's Law Dictionary" (4th Ed. 1951), 625), its use to mean remaining on land and refusing to leave it when ordered off is novel.

Judicial construction often has cured criminal statutes of the vice of vagueness, but this has been construction which confines, not expands, statutory language. Compare *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, with *Herndon* v. *Lowry*, *supra*.

At the time of their arrest, petitioners were engaged in the exercise of free expression by verbal and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining at the lunch counter when refused service.

If in the circumstances of this case free speech is to be curtailed, the least one has a right to expect is reasonable notice in the statute under which convictions are obtained. *Winters* v. *New York*, 333 U. S. 507. To uphold petitioners' conviction by novel and enlarged construction of this statute is to violate the principle that when freedom of expression is involved conduct must be proscribed within a statute "narrowly drawn to define and punish specific

conduct as constituting a clear and present danger to a substantial interest of the State", *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308; *Garner* v. *Louisiana*, 368 U. S. 157, 185 (Mr. Justice Harlan concurring). If the Supreme Court of South Carolina can affirm the convictions of these petitioners by such a construction it has exacted obedience to a rule or standard that is so ambiguous and fluid as to be no rule or standard at all. *Champlin Rev. Co.* v. *Corporation Com. of Oklahoma*, 286 U. S. 210. But when free expression is involved, the standard of precision is greater; the scope of construction must, consequently, be less. If this is the case when a State court limits a statute it must *a fortiori* be the case when a State court expands the meaning of the plain language of a statute. *Winters* v. *New York*, 333 U. S. 507, 512.

As construed and applied, the law in question no longer informs one what is forbidden in fair terms, and no longer warns against transgression. This failure offends the standard of fairness expressed by the rule against expansive construction of criminal laws which is embodied in the due process clause of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, for the foregoing reasons petitioners respectfully pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Recorder's Court

IN THE

RECORDER'S COURT OF THE CITY OF COLUMBIA

CITY OF COLUMBIA,

—v.—

SIMON BOUIE and TALMADGE J. NEAL.

The Court: I'm prepared to hand down an opinion. In the case of *Stramack* (?) v. *Walker,* 149 Southeastern, Mr. Justice Cothran, who is one of the ablest members of the Supreme Court of this State, wrote the opinion of the Court and that was decided on August 27, 1929. This was a suit for damages where an individual remained in a building after having been ordered by the owner to depart. He refused to leave the building and was forcibly ejected by the owner. In this case Mr. Justice Cothran, speaking for the Court, said: "The law is well settled as thus expressed in our own case of *State* v. *Lazarus,* 1, Mills, Constitution 34: "The Prosecutor having business to transact with him, had a right to enter his house but if he remained after having been ordered to depart, might have been put out of the house. The defendant using no more violence than was necessary to accomplish this object and showing to the satisfaction of the Court and the jury, that this was his object." Now, I might add that in Second Ruling Case Law, 559, the law is stated very succinctly and very properly: "It is a well settled principle that the occupant of any house, store or other building, has the legal right to control

it and to admit whom he pleases to enter and remain there and that he also has the right to expel from the room or building anyone who abuses the privilege which has been thus given to him. Therefore, while the entry by one person on the premises of another may be lawful by reason of express or implied invitation to enter, his failure to depart on the request of the owner will make him a trespasser and justify the owner in using reasonable force to eject him." That's a quotation from Ruling Case Law and I think that law is well settled in South Carolina and I might say in the United States, and furthermore, under the case which I stated some time ago during the early part of the morning, the Circuit Court of Appeals has held that the private owner of a business has a perfect right to control it and to do business with anybody he pleases to do business with. That applies not only to Howard Johnson but I think in the case involved, which is Eckerd's, they've got a perfect legal right to do business and transact business with anybody they want to do business with, and if they invite them to leave and request them to leave and if they refuse to do it, then they have every right under the law to use such force as may be necessary to eject them.

It is therefore the opinion of this Court that the defendants are guilty, and the fine of the Court against Simon Bouie is $100.00 or 30 days, for trespassing, and I suspend $24.50 of that, and on resisting arrest, the fine of the Court is $100.00 or 30 days, of which amount the sum of $24.50 is suspended, said fines to run consecutively.

The judgment of the Court is in the case of Talmadge J. Neal, the fine of the Court is that he pay a fine of $100.00 or serve 30 days, provided that the sum of $24.50 is suspended.

Order of the Richland County Court

CITY OF COLUMBIA,

—v.—

SIMON BOUIE and TALMADGE J. NEAL.

These Appeals from the Recorder's Court of The City of Columbia were orally argued together before me and taken under advisement. The facts are largely undisputed. All of the Defendants are Negroes. Eckerd's Drug Store and Taylor Street Pharmacy are separate stores in The City of Columbia. Besides filling prescriptions, each sells drugs and sundries and has a section where lunch, light snacks and soft drinks are served. Trade is with the general public in all the departments except the lunch department where only white people are served.

On one occasion, Bouie and Neal went into Eckerd's and on another day the other Defendants went into the Taylor Street Pharmacy, sat down in the lunch department and waited to be served. All said they intended to be arrested. In each case, the manager of the store came up to them with a peace officer and asked them to leave. They refused to do so and were then placed under arrest and charged with trespass and breach of the peace. Bouie, in addition, was charged with resisting arrest. It is undenied that he resisted.

Bouie and Neal were tried on March 25, 1960, and the other Defendants on March 30, 1960, before The Honorable John I. Rice, City Recorder of Columbia, without a jury; trial by jury having been waived by all the Defendants.

All the Defendants were convicted and sentenced and these appeals followed. Motions raising the constitutional questions were timely made.

There are 16 grounds of Appeal in the Bouie and Neal proceeding and 13 grounds of appeal in the proceeding involving the other Defendants, raising the following questions: (1) Did the State deny Defendants, who are Negroes, due process of law and equal protection of the laws within the Federal and State Constitutions either by using its peace officers to arrest them or by charging them with violating Secs. 16-386 (Criminal Trespass) and 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended, when they refused to leave a lunch counter when asked by the manager thereof to do so? (Bouie and Neal Nos. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15; other Defendants, Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13.) (2) Was there any substantial evidence pointing to the guilt of the Defendants? (Bouie and Neal, No. 8; other Defendants, No. 7.)

Since Defendants did not argue Bouie and Neal's Exceptions 7, 9 and 16, I have considered them abandoned.

The State has not denied Defendants equal protection of the laws or due process of law within the Federal or State Constitutional provisions.

A lunch room is like a restaurant and not like an inn.

The difference between a restaurant and an inn is explained in *Alpaugh* v. *Wolverton*, 36 S. E. (2d) 907 (Court of Appeals of Virginia) as follows:

> "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 A. Jr., Innkeepers, No. 120, p. 623; 43 C. J. S., Innkeepers, No. 20, subsection b, p. 1169. His responsibilities and rights are more like those of a shopkeeper.

Davidson v. *Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N. W. 967, 969, L. R. A. 1919 E, 704. He is under no common-law duty to serve anyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. *Nance* v. *Mayflower Tavern Inc.*, 106 Utah 517, 150 P. (2d) 773, 776; *Noble* v. *Higgins*, 95 Misc. 328, 158 N. Y. S. 867, 868."

And the proprietor can choose his customers on the basis of color without violating constitutional provisions. *State* v. *Clyburn*, 101 S. E. (2d) 295, 247 N. C. 455; *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack* v. *Atlantic Whitetower, etc.*, 181 F. Sup. 124 (Dist. Court Md.), 284 F. (2d) 746.

In the *Williams case, supra*, Judge Soper, speaking for the Court of Appeals for The Fourth Circuit, said: "As an instrument of local commerce, the restaurant is not subject to the Constitution and statutory provisions above (Commerce Clause and Civil Rights Acts of 1875), and is at liberty to deal with such persons as it may select."

And in *Boynton* v. *Virginia*, —— U. S. ——, 81 S. Ct. 182, 5 L. Ed. (2d) 206, The Supreme Court of The United States took care to state:

"Because of some of the arguments made here it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers."

Order of the Richland County Court

I have reviewed all of the cases cited by both the City and the Defendants, and in addition have reviewed subsequent cases of the Court of Appeals and The United States Supreme Court, including the case of *Burton* v. *Wilmington Parking Authority;* handed down on April 17, 1961, and find none applicable or controlling except the *Williams* and *Slack cases, supra.*

The Defendants, under South Carolina Law, had no right to remain in the stores after the manager asked them to leave. *Shramek* v. *Walker,* 149 S. E. 331, 152 S. C. 88. As the Court quoted the rule, "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser, and justify the owner in using reasonable force to eject him."

If the manager could have ejected Defendants himself, he could call upon officers of the law to eject them for him.

Since the Defendants refused to leave, they were criminal trespassers under Sec. 15-909 of The Code of Laws of South Carolina, 1952, and their conviction was proper.

Shelly v. *Kraemer,* 334 U. S. 1, 92 L. Ed. 345, 68 S. Ct. 836, 3 A. L. R. (2d) 441, and *Barrows* v. *Jackson,* 346 U. S. 249, 97 L. Ed. 1586, 73 Supreme Court 1031 cited by the Defendants are not in point. In both of these cases, there had been a sale of real estate to a non-caucasian in violation of restrictive covenants. In the *Shelley* case, the Court held that the equity of court of the State could not be used against the non-caucasian to enforce the covenant. In the *Barrows* case, the court held that the covenant could not be enforced by an action at law for damages against the co-covenanter, who broke the covenant.

In both of these cases, there were willing sellers and willing purchasers. The purchasers paid their money and entered into possession. Having entered, they had a right to remain.

In the cases before the Court, there were no two willing parties to a contract. True, the Defendants wanted to buy, but the storekeeper did not want to sell and the Defendants had no right to remain after being asked to leave. A white person would not have the right to remain after being asked to leave either. In either case, a person would be a trespasser. The Constitutions provide for equal rights, not paramount rights.

I have only to pick up my current telephone directory and look in the yellow pages to find at least four establishments listed under "Restaurants" that advertise that they are for colored or for colored only.

To say that a white proprietor may not call upon a policeman to remove or arrest a Negro trespasser or a Negro proprietor cannot call upon a policeman to remove or arrest a White trespasser would lead to confusion, lawlessness and possible anarchy. Certainly, the Constitutions intended no such result.

The fundamental fallacy in the argument of Defendants is the classification of the stores and lunch counters as public places and the operations thereof as public carriers.

A person, whatever his color, enters a public place or carrier as a matter of right. The same person, whatever his color, enters a store or restaurant or lunch counter by invitation.

That person's right to remain in a public place depends upon the law of the land, and in a public carrier upon such law and such reasonable rules as the carrier may make, and,

under the Constitution, neither the law nor rules may discriminate upon the basis of color.

On the other hand, the same person has no right to enter a store, a restaurant, or lunch counter unless and until invited, and may remain only so long as the invitation is extended. Whether he enters or remains depends solely upon the invitation of the storekeeper, who has a full choice in the matter. The operator can trade with whom he wills, or he can, at his own whim and pleasure, close up shop.

There is no question but that the Defendants are guilty. They were asked to leave and they refused. They, thereupon, were trespassers and such constituted a breach of the peace. In addition, Bouie admittedly resisted a lawful arrest.

The trespass statute (Section 16-386, as amended, Code of Laws of South Carolina, 1952) is not restricted to "pasture or open hunting lands" as defendants argue. The statute specifically says "any other lands". In Webster's New International Dictionary, the definition of "land" in "Law" is as follows:

> "(a) any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by man, as buildings, fences, etc., extending indefinitely vertically upwards and downwards. (b) An interest or estate in land; loosely any tenement or hereditament."

The statute thus applies everywhere and without discrimination as to color. There is no question but that it was designed to keep peace and order in the community.

Since Defendants had notice that neither store would serve Negroes at their lunch counters, they were trespassers

ab initio. Aside from this, however, the law is that even though a person enters property of another by invitation, he becomes a trespasser after he has been asked to leave. *Shramek* v. *Walker, supra.*

For the reasons herein stated, I am of the opinion that the judgments and sentences of the Recorder should be sustained and the Appeals dismissed, and it is so *Ordered.*

s/ JOHN W. CREWS,
Judge, Richland County Court.

Columbia, S. C.,
April 28, 1961.

Opinion of the Supreme Court of South Carolina

IN THE

SUPREME COURT OF SOUTH CAROLINA

THE CITY OF COLUMBIA,

Respondent,

—v.—

SIMON BOUIE and TALMADGE J. NEAL,

Appellants.

Appeal From Richland County
John W. Crews, County Judge

Filed February 13, 1962

AFFIRMED IN PART;
REVERSED IN PART

LEGGE, A. J.: The appellants Simon Bouie and Talmadge J. Neal, Negro college students, were arrested on March 14, 1960, and charged with trespass (Code, 1952, Section 16-386 as amended) and breach of the peace (Code, 1952, Section 15-909). Bouie was also charged with resisting arrest. On March 25, 1960, they were tried before the Recorder of the City of Columbia, without a jury. Both were found guilty of trespass; Bouie guilty also of resisting arrest. Bouie was senteneed to pay a fine of one hundred ($100.00) dollars or to imprisonment for thirty (30) days on each charge, twenty-four and 50/100 ($24.50) of each fine being suspended and the prison sentences to run con-

secutively. Neal was sentenced to pay a fine of one hundred ($100.00) dollars, of which twenty-four and 50/100 ($24.50) was suspended, or to imprisonment for thirty (30) days. On appeal to the Richland County Court the judgment of the Recorder's Court was affirmed by order dated April 28, 1961, from which this appeal comes.

Eckerd's one of Columbia's larger drugstores, in addition to selling to the general public drugs, cosmetics and other articles usually sold in drugstores, maintains a luncheonette department. Its policy is not to serve Negroes in that department.

On March 14, 1960, about noon, the appellants entered this drugstore and sat down in a booth in the luncheonette department for the purpose, according to their testimony, of ordering food and being served. Neal testified that it was his intention to be arrested; Bouie testified that he knew of the store's policy not to serve Negroes in that department, and that it was his purpose also to be arrested "if it took that". No employee of the store approached them, and they continued to sit in the booth for some fifteen minutes, each with an open book before him, when the manager of the store came up, in company with a police officer, told them that they would not be served, and twice requested them to leave. Upon their ignoring such request, the police officer asked them to leave, which request brought no result other than the query "for what" from Bouie. The police officer then told them to leave and that they were under arrest. Thereupon Neal closed his book and got up; Bouie did not, and the officer thereupon caught him by the arm and lifted him out of the seat. Bouie's book being still on the table, he was permitted to get it; and the officer then seized him by the belt and proceeded to march him out of the store. Bouie testified that

he made no resistance, but only said to the officer when the latter had hold of his belt, "That's all right, Sheriff, I'll come on". The officer testified that Bouie said: "Don't hold me, I'm not going anywhere", and that after they had proceeded a few steps he "started pushing back and said 'Take your hands off me, you don't have to hold me.'"

The appeal here is based upon four Exceptions of which Nos. 3 and 4 present, in substance, the contention that appellants' arrest by the police officer at the instance of the store manager, and the convictions of trespass that followed, were in furtherance of an unlawful policy of racial discrimination and constituted state action in violation of appellants' rights under the Fourteenth Amendment. Identical contention was made, considered, and rejected in City of Greenville v. Peterson, filed November 10, 1961, —— S. C. ——, —— S. E. (2d) ——; City of Charleston v. Mitchell, filed December 13, 1961, —— S. C. ——, —— S. E. (2d) —— and City of Columbia v. Barr, filed December 14, 1961, —— S. C. ——, —— S. E. (2d) ——, in each of which was involved a sit-down demonstration, similar to that disclosed by the uncontradicted evidence here, at a lunch counter in a place of business privately owned and operated, as was Eckerd's in the case at bar. Exceptions 3 and 4 are overruled.

Exceptions 1 and 2 purport to question the sufficiency of the evidence to make out a case of trespass as to either appellant, or a case of resisting arrest as to the appellant Bouie. So far as they relate to the charge of trespass, these exceptions are without merit. The uncontradicted testimony, to which we have referred, amply supported that charge.

On the other hand, the evidence was in our opinion insufficient to warrant Bouie's conviction on the charge of

resisting arrest. It is apparent from the testimony of the arresting officer that the only "resistance" on Bouie's part was his failure to obey immediately the officer's order, with the result that the latter "had to pick him up out of the seat". Resisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it, State v. Hollman, 232 S. C. 489, 102 S. E. (2d) 873. But we do not think that such momentary delay in responding to the officer's command as is shown by the testimony here amounted to "resistance" within the intent of the law, City of Charleston v. Mitchell, supra.

The judgment is affirmed as to the conviction and sentence of each of the appellants on the charge of trespass; it is reversed as to the conviction and sentence of the appellant Bouie on the charge of resisting arrest.

Affirmed in part and reversed in part.

TAYLOR, C.J., MOSS and LEWIS, JJ., concur.

Order of Denial of Rehearing

IN THE

SUPREME COURT OF SOUTH CAROLINA

CITY OF COLUMBIA,

Respondent,

—against—

SIMON BOUIE and TALMADGE J. NEAL,

Appellants.

(Endorsed on back of Petition for Rehearing)

THE WITHIN PETITION FOR REHEARING has been carefully considered and is found to be without merit. The Petition is therefore denied.

Filed: March 7, 1962.

s/ C. A. TAYLOR C.J.

s/ LIONEL K. LEGGE A.J.

s/ JOSEPH R. MOSS A.J.

s/ J. WOODROW LEWIS A.J.

Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~150~~ # 10 1963

SIMON BOUIE AND TALMADGE J. NEAL, PETITIONERS,

versus

THE CITY OF COLUMBIA, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

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SIMON BOUIE AND TALMADGE J. NEAL, PETITIONERS,

versus

THE CITY OF COLUMBIA, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

We adopt as our Statement the summary of the proceedings in the Recorder's Court as given by Mr. Justice Legge for the Supreme Court of South Carolina [239 S. C. 396, 123 S. E. 2d. (521)]:

> "The appellants Simon Bouie and Talmadge J. Neal, Negro college students, were arrested on March 14, 1960, and charged with trespass (Code, 1952, Section 16-386 as amended) and breach of the peace (Code, 1952, Section 15-909). Bouie was also charged with resisting arrest. On March 25, 1960, they were tried before the Recorder of the City of Columbia, without a jury. Both were found guilty of trespass; Bouie guilty also of resisting arrest. Bouie was sentenced to pay a

fine of one hundred ($100.00) dollars, or to imprisonment for thirty (30) days on each charge, twenty-four and 50/100 ($24.50) of each fine being suspended and the prison sentences to run consecutively. Neal was sentenced to pay a fine of one hundred ($100.00) dollars, of which twenty-four and 50/100 ($24.50) was suspended, or to imprisonment for thirty (30) days. On appeal to the Richland County Court the judgment of the Recorder's Court was affirmed by order dated April 28, 1961, from which this appeal comes.

"Eckerd's, one of Columbia's larger drugstores, in addition to selling to the general public drugs, cosmetics and other articles usually sold in drugstores, maintains a luncheonette department. Its policy is not to serve Negroes in that department."

"On March 14, 1960, about noon, the appellants entered this drugstore and sat down in a booth in the luncheonette department for the purpose, according to their testimony, of ordering food and being served. Neal testified that it was his intention to be arrested; Bouie testified that he knew of the store's policy not to serve Negroes in that department, and that it was his purpose also to be arrested 'if it took that'. No employee of the store approached them, and they continued to sit in the booth for some fifteen minutes, each with an open book before him, when the manager of the store came up, in company with a police officer, told them that they would not be served, and twice requested them to leave. Upon their ignoring such request, the police officer asked them to leave, which request brought no result other than the query 'for what' from Bouie. The police officer then told them to leave and that they were under arrest. Thereupon Neal closed his book and got up; Bouie did not, and the officer thereupon caught him by the arm and lifted him out of the seat. Bouie's book being still on the table, he was permitted to get it; and the officer then seized him by the belt and proceeded to march him out of the store. Bouie testified that he made no resistance, but only said to the officer when the latter had hold of his belt,

'That's all right, Sheriff, I'll come on'. The officer testified that Bouie said: 'Don't hold me, I'm not going anywhere', and that after they had proceeded a few steps he started pushing back and said 'Take your hands off me, you don't have to hold me.'"

REASONS FOR DENYING THE WRIT

I

The Petitioners Were Trespassers and Were Subject to Being Ejected or Arrested Without Violating Their Rights Under the Fourteenth Amendment.

This case does not come within the rule of *Garner v. Louisiana*, 368 U. S. 157, 7 L. Ed. (2d) 207, 82 S. Ct. 248. Petitioners were "sit-ins" but they were not arrested for merely sitting or demonstrating. They were arrested only after the owner of the private luncheonette department asked them to leave the premises and they failed or refused to do so. They were trespassers then, if not before, both under common and statutory law and were arrested and convicted as such.

The luncheonette dept. was privately owned, was within a privately owned drugstore in a privately owned building on privately owned ground and was engaged purely in local commerce. The rights and duties of the proprietor were like those of a restaurant not an inn. As stated in *Alpaugh v. Wolverton*, 36 S. E. (2d) 906, 184 Va. 943, "He [the proprietor] is under no common law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds."

Such proprietor violates no constitutional provisions if he makes a choice on the basis of color. *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack v. Atlantic White Tower System, Inc.*, 284 F. (2d) 746 (1960).

If petitioners had no right to be served, the proprietor could as he did here, ask them to leave and upon their refusal to comply with his request, they became trespassers. This has always been the law in South Carolina.

In *State v. Lazarus*, 1 Mill, Const. (8 S. C. Law) 31, (1817), the South Carolina Constitutional Court said: • • • "the prosecutor having business to transact with him [the defendant], had a right to enter his house and if he remained after having been ordered to depart, might have been put out of the house, the defendant using no more violence than was necessary to accomplish this object, and showing to the satisfaction of the court and judge, that this was his object."

In *Shramek v. Walker*, 152 S. C. 88, 149 S. E. 331 (1929), the Supreme Court of South Carolina quoted the rule as stated above in the *Lazarus case*, then quoted further with approval from 2 R. C. L., 559, as follows:

> "Therefore, while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser and justify the owner in using reasonable force to eject him."

Neither of the above cases involved questions of race.

In addition to becoming trespassers at common law, petitioners also violated Section 16-386 of the Code of Laws of South Carolina, 1952, as amended. The section was apparently first enacted in 1866. In the General Statutes of South Carolina (1882), it read as follows:

> "Sec. 2507. Every entry on the enclosed or unenclosed land of another, after notice from the owner or tenant prohibiting the same shall be a misdemeanor."

An Amendment of 1883 left out the words "the enclosed or unenclosed" and added punishment by fine of not

more than $100.00 or imprisonment of not more than 30 days, **1883 Acts, etc. of South Carolina (18)**, page 43.

An Amendment of 1898 made the posting and publishing of notice conclusive as to those making entry for hunting and fishing. **1898 Acts, etc. of South Carolina (22)**, page 811.

The Amendment of 1954 was tied in with an Amendment to Section 16-355 increasing the penalty for larceny of livestock and as such added the words "where any horse, mule, cow, hog or any livestock is pastured, or any other lands of another", eliminated the requirement for publishing the notice and changed the conclusiveness of notice from the purpose of hunting and fishing to that of trespassing. **1954 Acts, etc. of South Carolina (48)**, page 1705.

The section thus read at the time petitioners were arrested in 1960, as follows:

> "Sec. 16-386. Entry on lands of another after notice prohibiting same. Every entry upon the lands of another where any horse, mule, cow, hog, or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing."

The pertinent language, however, has remained the same for many years: "Every entry upon lands of another * * * after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor. * * *"

The South Carolina Supreme Court made no strained nor novel interpretation in applying the section to petitioners. In Webster's New International Dictionary (Second Edition) "land" as used in "law" is defined as follows:

> "a. Any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc. and everything annexed to it, whether by nature, as trees, water, etc., or by man as buildings, fences, etc., extending indefinitely vertically upwards and downwards.
>
> "b. An interest or estate in land, loosely, any tenement or hereditament."

And the South Carolina Supreme Court simply followed the common law rule as stated in the *Lazarus* and *Walker cases, supra*, in applying the rule that a person may become a trespasser by refusing to leave even though his entry may have been lawful. *City v. Mitchell*, filed Dec. 13 1961, 239 S. C. 376, 123 S. E. (2d) 512.

II

The Decision of the Supreme Court of South Carolina Granted Petitioners All Rights to Freedom of Expression to Which They Were Entitled Under the Fourteenth Amendment to the Constitution of the United States.

There is no question but if a White man or a group of White men had gone into Eckerd's drug store on the day in question, had sat down, expecting service, had been told that they would not be served, and were further asked to leave but refused to do so, that they would have been guilty of violating Sec. 16-386 of the Code of Laws of South Carolina, 1952, as amended.

If Petitioners' argument is understood, however, Petitioners urge that because they were Negroes and the owners of the luncheonette White, their right to protest exceeded their right to be served.

Is the right to protest greater than the right to agree? The Fourteenth Amendment states simply and clearly that no State shall "deny to any person within its jurisdiction the **equal** protection of the laws."

The "freedoms" guaranteed by the Constitution do not give a person a license to stand in a prohibited place to protest where he could not have stood to agree. Rather, the Constitution guarantees that a person standing where he has a right to stand, shall not be **moved** from that place by the State because of his protest, if his protest is within the protection of the Constitution.

As a practical matter, however, Petitioners were permitted to give full range to their protest. As they state on pages 16 and 17 of their Petition for Writ of Certiorari:

> "Petitioners were engaged in the exercise of free expression by means of nonverbal requests for nondiscriminatory lunch counter service which were implicit in their continued remaining at the lunch counter when refused service. The fact that sit-in demonstrations are a form of protest and expression was observed in Mr. Justice Harlan's concurrence in *Garner v. Louisiana, supra*. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. Petitioners did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There were no speeches, picket signs, handbills or other forms of expression in the store which were possibly inappropriate to the time and place. Rather petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions."

The owner told them that they would not be served and asked them to leave. It was only after they refused to comply with this request that they were arrested.

What more did petitioners want to do to express their protest? Continue to sit? For how long? Who decides when they shall leave?

This was not a street, private or otherwise, as was involved in *Marsh v. Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265, where a person enters and stands as a matter of right but a private luncheonette in local commerce where a person enters and stands (or sits) upon invitation, express or implied, of the owner. The law decides how long a person has the right to remain on a street but the owner decides who shall remain in his store, and how long.

CONCLUSION

In conclusion, it is respectfully submitted that the Supreme Court of South Carolina decided all federal questions of substance in the case in accordance with applicable decisions of this Court and the Petition for Writ of Certiorari should be denied.

All of which is respectfully submitted.

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